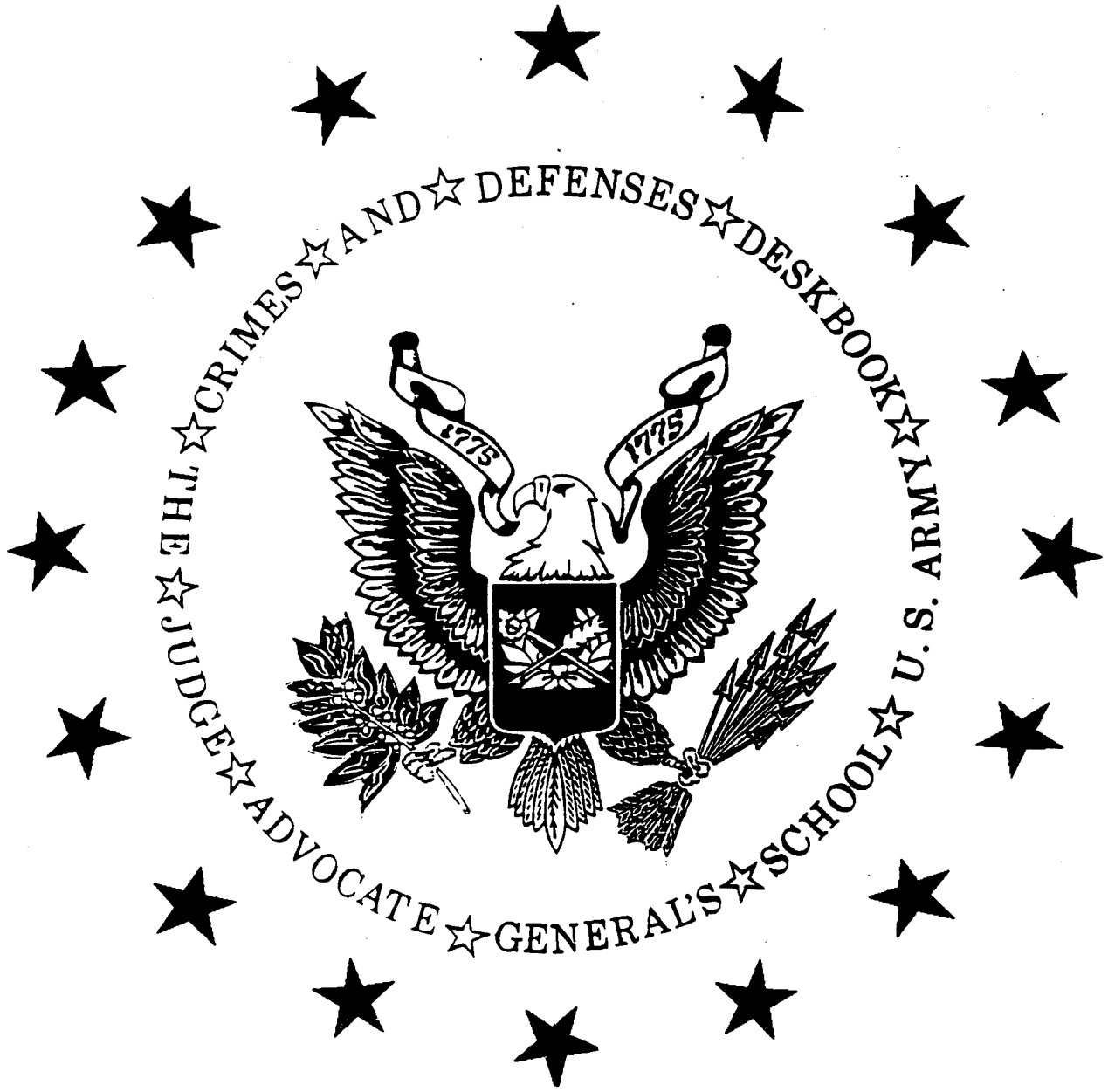

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The Judge Advocate General's School
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The Crimes and Defenses Deskbook, July 1994, is designed to supplement DA Pamphlets 27-9, 27-173, 27-22, and instruction provided at The Judge Advocate General's School, U.S. Army. The Deskbook is designed as a "starting point" for research.

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FOREWORD

CRIMES AND DEFENSES DESKBOOK JULY 1994 is designed to supplement DA Pamphlets 27-9, 27-173, 27-22, and instruction provided at The Judge Advocate General's School, U.S. Army. An effort has been made to adopt a uniform format; however, the content and style of the chapters will vary somewhat due to the individual writing styles of the various author-editors who have contributed to it.

This Deskbook is designed as a "starting point" for research. The reader should not expect an exhaustive listing of all references on a particular issue. As with any legal text, this volume will, in some respects, be out-of-date before it is distributed; the most recent cases cited are those published 39 M.J. No. 3 (pp 1-41, 501-584).

Citation form in military criminal law is generally controlled by A Uniform System of Citation (15th ed. 1991), as supplemented by The Judge Advocate General's School, Military Citation (5th ed. July 1992). Throughout the Criminal Law Deskbook, a variation of footnote citation form has been used for emphasis. The principal references and their citations are:

1. Uniform Code of Military Justice, articles 1-140, 10 U.S.C. §§ 801-940 cited as UCMJ arts. 1-140, respectively.

2. Manual for Courts-Martial, United States, 1984 cited as MCM, 1984 [when distinctions are made between the 1984 Manual and earlier editions, the dates will be included].

3. Dep't of Army Regulations cited as AR _____.

4. Dep't of Army Pamphlets cited as DA Pam _____.

5. Federal Rules of Evidence cited as F.R.E.

6. Military Rules of Evidence cited as M.R.E.

7. Rules for Courts-Martial cited as R.C.M.

8. United States Court of Military Appeals: Parallel citations are not used; citations to Court-Martial Reports (C.M.R.) or West's Military Justice Reporter (M.J.) only. For C.M.R. citation, "C.M.A." will be included in the parenthetical that immediately follows the citation to designate these decisions.

The term "he" and its derivatives used in these volumes are generic, and except where otherwise indicated by the context, should be considered as applying to both male and female.

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THE GENERAL ARTICLES

MILITARY LAW GLOSSARY

The following terms are frequently encountered in military law. The list is neither complete nor intended as a substitute for an up-to-date Law Dictionary, but is designed solely as a ready reference for the meaning of certain terms.

ABET--To encourage, incite, or aid another to commit a crime. UCMJ art. 77.

ACCESSORY AFTER THE FACT--Any person subject to the Code who, knowing that an offense punishable by the UCMJ has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial or punishment. UCMJ art. 78.

ACCUSED--One charged with an offense under the UCMJ.

ACCUSER--Any person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused. UCMJ art. 1(9).

ACTIVE DUTY--The status of being in the active federal service of any of the armed forces under a competent appointment or enlistment or pursuant to a competent muster, order, call or induction.

ACTUAL KNOWLEDGE--A state wherein the person in fact knows of the existence of an order, regulation, fact, etc., in question.

ADDITIONAL CHARGES--New and separate charges preferred while other preferred charges are still pending against the same accused.

ADMISSION--A self-incriminatory statement falling short of a complete acknowledgement of guilt.

AIDER AND ABETTOR--One who shares the criminal intent or purpose of the perpetrator, and hence is liable as a principal. UCMJ art. 77.

ALIBI--A defense that the accused could not have committed the offense alleged because he was somewhere else when the crime was committed.

ALLEGATION--The assertion, declaration, or statement of a party in a pleading of what he expects to prove.

ALLEGE--To assert or state in a pleading; to plead in a specification.

APPEAL--A complaint to a superior court of an injustice done or error committed by an inferior court whose judgment or decision the court above is called upon to correct or reverse.

APPELLATE REVIEW--Automatic reconsideration of the records of cases tried by court-martial. Reviewing authorities include the convening authority, GCM

convening authority, the Court of Military Review, and the Court of Military Appeals. The level to which a case proceeds for review is determined by the Code. See UCMJ art. 65-67.

APPREHENSION--The taking of a person into custody.

ARRAIGNMENT--The reading of the charges and specifications to the accused or the waiver of their reading, coupled with the request that the accused enter a plea.

ARREST--Moral restraint imposed by oral or written orders of competent authority limiting a person's personal liberty pending disposition of charges. Arrest is not imposed as punishment for an offense. R.C.M. 304(a)(3).

ASSAULT--An attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated. UCMJ art. 128.

ATTEMPT--An act, or acts, done with a specific intent to commit an offense under the UCMJ, amounting to more than mere preparation, and tending, but failing to effect the commission of such offense. UCMJ art. 80.

BAD CONDUCT DISCHARGE--One of two types of punitive discharges that may be awarded an enlisted person; designed as a punishment for bad conduct, rather than as a punishment for serious offenses of either a civil or military nature; may be awarded by GCM or BCD SPCM.

BATTERY--An unlawful and intentional or culpably negligent application of force to the person of another by a material agency used directly or indirectly. UCMJ art. 128.

BREACH OF ARREST--Going beyond the limits of arrest as set by orders. UCMJ art. 95.

BREACH OF PEACE--An unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature. UCMJ art. 116.

BURGLARY--The breaking and entering in the nighttime of the dwelling of another with intent to commit murder, manslaughter, rape, carnal knowledge, larceny, wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, or assault. UCMJ art. 129.

CAPITAL OFFENSE--An offense for which the maximum punishment includes the death penalty.

CARNAL KNOWLEDGE--An act of sexual intercourse, under circumstances not amounting to rape, by a person with a female who is not his wife and who has not attained the age of 16 years. UCMJ art. 120.

CHALLENGE--A formal objection to a member of a court or the military judge continuing as such in subsequent proceedings. May be either (1) a challenge for cause--objections based on a fact or circumstance which disqualifies the person

challenged from further participation in the proceedings, or (2) peremptory challenge--an objection permitted without a showing of grounds or basis, except that the military judge cannot be peremptorily challenged.

CHARGE--A formal statement of the article of the UCMJ which the accused is alleged to have violated.

CHARGE AND SPECIFICATION--A description in writing of the offense which the accused is alleged to have committed; each specification, together with the charge under which it is placed, constitutes a separate accusation.

CIRCUMSTANTIAL EVIDENCE--Evidence which tends directly to prove or disprove not a fact in issue, but a fact or circumstance from which, either alone or in connection with other facts, a court may, according to the common experience of mankind, reasonably infer the existence or nonexistence of another fact which is in the issue; sometimes called indirect evidence.

COMMAND--(1) An order; (2) any demanding of another to do an act towards commission of a crime. UCMJ art. 77.

COMMON TRIAL--A trial in which two or more persons are charged with the commission of an offense or offenses which, although not jointly committed, were committed at the same time and place and are provable by the same evidence.

CONCURRENT JURISDICTION--Jurisdiction which is possessed over the same parties or subject matter at the same time by two or more separate tribunals.

CONDITIONAL GUILTY PLEA--A plea of guilty that reserves in writing the right to appeal adverse determinations of pretrial motions.

CONDITIONS ON LIBERTY--A form of pretrial restraint: orders directing a person to do or refrain from doing certain acts. R.C.M. 304(a)(1).

CONFESSION--An acknowledgement of guilt of an offense.

CONFINEMENT--The physical restraint of a person, imposed by either oral or written orders of competent authority, depriving him of freedom. R.C.M. 304(a)(4).

CONFINEMENT FACILITY--Facility for the confinement of military prisoners. It applies to transient confinement facilities, installation confinement facilities, area confinement facilities and hospitalized prisoner wards.

CONSPIRACY--A combination of two or more persons who have agreed to accomplish, by concerted action, an unlawful purpose or some purpose not in itself unlawful but accomplished by unlawful means, and the doing of some act by one or more of the conspirators to effect the object of that agreement. UCMJ art. 81.

CONSTRUCTIVE KNOWLEDGE--Knowledge which may be found to have existed because the regulation, notice, fact or directive, etc., at issue was of so notorious a nature, or was so conspicuously posted or distributed, that the

accused ought to have known of its existence; knowledge is constructive when it is shown that the accused would in the ordinary course of events, or by the exercise of ordinary care, have secured knowledge of the order, notice of movement, etc.

CONTEMPT--The use of any menacing words, signs, or gestures in the presence of the court, or the disturbance of its proceedings by any riot or disorder; UCMJ art. 48; the refusal of a duly subpoenaed civilian witness to qualify, appear, or to testify before a court-martial, court of inquiry, or military commission.

CONVENING AUTHORITY--The officer having authority to convene a court-martial and who convened the court-martial in question, or his or her successor in command.

CONVENING ORDER--The document by which a court-martial is created which specifies the type of court, the names of the members, and, when appropriate, the authority by which the court is created.

CORPUS DELICTI--The body of a crime; facts or circumstances showing that the crime alleged has been committed by someone.

COUNSELING--Directly or indirectly advising or encouraging another to commit an offense. UCMJ art. 77.

COURT-MARTIAL--A military tribunal composed of one or more eligible members of the armed forces (the number depending on the type of court), the functions of which are to decide whether a person subject to military law has committed a violation of the UCMJ and, if it finds that person guilty, to adjudge punishment for the offense.

COURT-MARTIAL ORDERS--May be either a "convening order" or a "promulgating order." See respective definitions.

COURT OF INQUIRY--The most formal fact-finding body convened in the armed forces, governed by UCMJ art. 135.

COURT OF MILITARY APPEALS--A court consisting of three judges appointed from civilian life by the President, by and with the advice and consent of the Senate, for a term of fifteen years--the highest appellate court under the UCMJ. UCMJ art. 67(a)(1).

COURT OF MILITARY REVIEW--A board composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States, constituted to review the records of certain courts-martial. UCMJ art. 66(a).

CREDIBILITY--Worthiness of belief.

CULPABLE--Deserving blame.

CULPABLE NEGLIGENCE--A degree of carelessness greater than simple negligence; a negligent act or omission accompanied by a flagrant or reckless disregard for the foreseeable consequences to others of such act or omission.

CUSTODY--That restraint of free movement which is imposed by lawful apprehension.

CUSTOM--A practice which: (a) has been long continued; (b) is certain or uniform; (c) is compulsory, consistent, general, and known; (d) and is not in opposition to the terms and provisions of a statute or lawful regulation or order.

DANGEROUS WEAPON--A weapon used in a manner likely to produce death or grievous bodily harm. MCM, 1984, Part IV, para. 54c(4)(a)(i).

DEFERMENT OF CONFINEMENT--A postponement of the running and service of a sentence to confinement. R.C.M. 1101(c)(1).

DEPOSITION--The testimony of a witness taken out of court, reduced to writing, under oath or affirmation, before a person empowered to administer oaths, in answer to interrogatories (questions) and cross-interrogatories submitted by the party desiring the deposition and the opposite party, or based on oral examination by counsel for accused and the prosecution. R.C.M. 702(a) discussion.

DERELICTION IN THE PERFORMANCE OF DUTIES--Willfully or negligently failing to perform assigned duties or performing them in a culpably inefficient manner. MCM, 1984, Part IV, para. 16c(3).

DESIGN--Specifically intended; inferred from conduct so shockingly and grossly devoid of care as to leave room for no reasonable inference but that the result was contemplated as a probable result of the course of conduct followed.

DESTROYED--(As used in UCMJ art. 108). Not completely demolished or annihilated, but only sufficiently injured to be useless for the purpose for which it was intended.

DETAIL--Order to a person to perform a specific temporary duty.

DETAINER--A writ for the further detention of a person already in custody.

DIRECT EVIDENCE--Evidence which tends directly to prove or disprove a fact in issue.

DISHONORABLE DISCHARGE--The most severe punitive discharge, reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized by the civil law as felonies, or of offenses of military nature requiring severe punishment.

DOMINION--Control of property; possession of property with the ability to exercise control over it.

DRUNKENNESS-- (1) As an offense under the UCMJ, intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties; may be caused by liquor or drugs.

(2) As a defense in rebuttal of the existence of specific intent or knowledge, intoxication which amounts to loss of reason preventing the accused from knowing the nature of his act or the natural and probable consequences thereof.

DUE PROCESS--A course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights, such as exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe.

DURESS--Unlawful constraint of a person forced to do some act that he or she otherwise would not have done.

ELEMENTS--The essential ingredients of an offense; the acts or omissions which form the basis of any particular offense.

ENTRAPMENT--A defense available when actions of an agent of the government intentionally instill in the mind of the accused an intent to commit a criminal offense and when the accused had no notion, predisposition, or intent to commit the offense and was not engaged in an unlawful business which the agent was trying to detect.

EVIDENCE--Information admissible before a court of law which tends to prove or disprove any matter in question or to influence belief respecting it.

EXECUTION OF OFFICE--Engaged in any act or service required or authorized to be done by statute, regulation, the order of a superior, or military usage.

EX POST FACTO LAW--A law passed after the occurrence of a fact or commission of an act which makes the act punishable, imposes additional punishment, or changes the rules of evidence by which less or different testimony is sufficient to convict.

FINE--Punishment that makes the accused liable to the United States for a specified amount of money.

FORFEITURE OF PAY--Punishment that deprives the accused of all or part of his future pay.

FORMER JEOPARDY--The rule of law that no person shall be tried for the same offense by the same sovereign a second time without his or her consent. UCMJ art. 44.

FORMER PUNISHMENT--The rule of law that nonjudicial punishment for a minor offense may be interposed as a bar to trial for same offense.

GRIEVOUS BODILY HARM--Serious bodily injury; does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or

dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

GROSS NEGLIGENCE--A wanton, careless and reckless disregard of the rights and safety of others; an utter indifference to the consequences of one's actions; a total abandonment of the standard of reasonable care coupled with a wanton disregard for the safety of others; that degree of negligence that is substantially higher in magnitude than simple inadvertence, but falls short of intentional wrong.

HABEAS CORPUS--An order from a court which causes the custodian of a prisoner to appear before a court to show cause why the prisoner is confined or detained.

HARMLESS ERROR--Error of such quantity and quality that a court of reasonable and conscientious persons would have reached the same result had the error not been committed.

INFERENCE--A deduction based upon reason from proof of a predicate fact or facts.

INSANITY--See mental capacity, mental responsibility.

INSTALLATION COMMANDER--Commanding officer of a post, camp or station.

IPSO FACTO--By the very fact itself.

JOINT OFFENSE--One committed by two or more persons acting together with a common intent.

JURISDICTION--The power of a court to hear and decide a case and to impose any appropriate punishment.

KNOWINGLY--With knowledge; consciously, intelligently.

LESSER INCLUDED OFFENSE--An offense necessarily included in the offense charged; an offense containing some, but not all, of the elements of the offense charged, so that, if one or more of the elements of the offense charged is not proved, the evidence may still support a finding of guilty of the included offense.

MATTER IN AGGRAVATION--Any circumstance attending the commission of a crime which increases its enormity.

MATTER IN EXTENUATION--Any circumstance serving to explain the commission of the offense, including the reasons that actuated the accused, but not extending to a legal justification. Opposite of aggravation.

MENTAL CAPACITY--The ability of the accused at the time of trial to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense.

MENTAL RESPONSIBILITY--A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. See infra, chapter 4.

MILITARY DUE PROCESS--Due process under protections and rights granted military personnel by the Constitution or laws enacted by Congress.

MILITARY JUDGE--An official of a general or special court-martial detailed in accordance with UCMJ art. 26.

MINOR OFFENSE--An offense for which confinement for less than one year is authorized; generally also misconduct not involving moral turpitude or any greater degree of criminality than is involved in the average offense tried by summary court-martial.

MISTRIAL--The situation existing when it becomes apparent that either party cannot receive a fair and impartial hearing before the sitting tribunal.

MORAL TURPITUDE--An act of baseness, vileness, or depravity in private or social duties contrary to the accepted and customary rule of right and duty between persons.

MOTION TO DISMISS--A motion raising any defense or objection in bar of trial.

MOTION TO GRANT APPROPRIATE RELIEF--A motion made to cure a defect of form or substance that impedes the accused in properly preparing for trial or conducting a defense.

MOTION TO SEVER--A motion by one or more co-accused to be tried separately from the other or others.

NEGLECT--Omission or failure to do an act or perform a duty due to want of due care or attention.

NEGLIGENCE--The omission to do something which a reasonable person, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent person would not do; the absence of due care; the legal standard that defines what would have been done by a reasonable, prudent person in the same or similar circumstances; as used in the UCMJ, the failure to exercise the care, prudence, or attention to duties which the interests of the Government require to be exercised by a prudent and reasonable person under the circumstances.

NONJUDICIAL PUNISHMENT--Punishment imposed under UCMJ art. 15 for minor offenses, without the intervention of a court-martial.

ON-DUTY--As used in UCMJ art. 112, the exercise of duties of routine or detail in garrison, at a station, or in the field. Does not relate to those periods when, no duty being required of them by order or regulations, officers

and enlisted persons occupy the status of leisure known as "off duty" or on "liberty."

PER SE--Taken alone; in and of itself; by itself.

PLEADING--The written formal indictment by which an accused is charged with an offense; in military law, the "pleadings" are called "charges and specifications."

POSSESSION--Physical control over an item of property.

PREFERRAL OF CHARGES--The swearing out and signing of charges against an accused.

PRESUMPTION--A justifiable inference; a well-recognized example of the use of circumstantial evidence, the weight or effect of which should be measured only in terms of its logical value.

PRIMA FACIE CASE--Introduction of substantial evidence which, together with all proper inferences to be drawn therefrom and all applicable presumptions, reasonably tends to establish every essential element of an offense charged or included in any specification.

PRINCIPAL--Under UCMJ art. 77: (1) One who aids, abets, counsels, commands, or procures another to commit an offense which is subsequently perpetrated in consequence of such counsel, command or procuring, whether he is present or absent at the commission of the offense; (2) The perpetrator.

PROCEDURAL LAW--The rules of pleading and practice by which rights are accorded and enforced.

PROMULGATING ORDERS--An order issued by the convening authority promulgating the result of the trial and the initial action of the convening authority.

PROXIMATE CAUSE--That which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.

PUNITIVE ARTICLES--UCMJ arts. 77-134, which generally describe various crimes and offenses and state how they may be punished.

PUNITIVE DISCHARGE--A bad conduct discharge or dishonorable discharge from the Army.

RECKLESSLY--With disregard for the probable destructive results of some voluntary act; with culpable negligence.

REFERRAL OF CHARGES--The order of a convening authority that charges against an accused will be tried by a specified court-martial.

RESISTING APPREHENSION--An active resistance to the restraint attempted to be imposed by the person apprehending.

RESTRICTION IN LIEU OF ARREST--Moral restraint, less severe than arrest, imposed upon a person by oral or written orders, limiting him or her to specified areas of a military command, with the further provision that he or she will participate in all military duties and activities of the organization while under such restriction. R.C.M. 304(a)(2).

RESTRICTION TO LIMITS--Restriction imposed as punishment. R.C.M. 1003(b)(6).

REVISION--A procedure to correct an apparent error or omission or improper or inconsistent action of a court-martial with respect to a finding or a sentence.

SELF-INCRIMINATION--The giving of evidence against oneself which tends to establish guilt of an offense.

SPECIFICATION--A formal statement of specific acts and circumstances relied upon as constituting the offense charged.

STATUTE OF LIMITATIONS--The rule of law which establishes the time within which an accused must be charged with an offense.

SUBSTANTIVE LAW--That portion of the body of law which contains rights and duties and regulations of the government, as opposed to that part which contains the rules and remedies by which the substantive law is administered.

SUPERVISORY AUTHORITY--An officer exercising general court-martial jurisdiction who acts on summary court-martial and special court-martial records after the convening authority has acted.

TRUE OWNER--The person who, at the time of the taking, obtaining, or withholding of property, had the superior right to possession of the property involved in the light of all conflicting interests involved in the case.

USAGE--A general habit, mode, or course of procedure.

VERBATIM--In the exact words; word for word.

WANTON--Includes "reckless" but, in describing the operation of a vehicle, may mean willfulness or a gross disregard of probable consequences, and thus describe a more aggravated offense.

WILLFUL--Deliberate, voluntary, and intentional, as distinguished from acts committed through inadvertence, accident, or ordinary negligence.

WRONGFUL--Contrary to law, regulation, lawful order or custom.

CHAPTER 1

SCOPE OF CRIMINAL LIABILITY

I. **PRINCIPALS.** UCMJ art. 77.

A. Introduction.

1. "Any person punishable under this chapter who:

a. commits an offense punishable by this chapter or aids, abets, counsels, commands or procures its commission, or

b. causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal." UCMJ art. 77.

2. A perpetrator is one who actually commits the offense, either by the perpetrator's own hand, or by causing an offense to be committed by knowingly or intentionally inducing or setting in motion acts by an animate or inanimate agency or instrumentality which result in the commisiion of an offense. MCM, 1984, Part IV, para. 1b(2)(a).

3. If one is not a perpetrator, to be guilty of an offense committed by a perpetrator, the person must:

a. Assist, encourage, advise, instigate, counsel, command, or procure another to commit, assist, encourage, advise, counsel, or command another in the commission of the offense; and

b. Share in the criminal purpose or design. MCM, 1984, Part IV, para. 1b(2)(b).

4. "Inactive presence during the commission of an offense is clearly an insufficient link to guilt. The aider and abettor must share the criminal intent or purpose of the active perpetrator of the crime and must by his presence aid, encourage or incite the major actor to commit it. . . . The proof must show that the aider or abettor did in some sort of way associate himself with the venture, that he participated in it as in something he wished to bring about and that he sought by his action to make it successful. . . . The standard of relationship to the offense by which conviction as an aider and abettor must be measured, lies somewhat between proof of participation as a paramount agent, on the one hand, and speculative inference based on mere presence at the scene of the crime, on the other, and is made definite by the requirement of evidence of specific intent." United States v. Jacobs, 2 C.M.R. 115, 117 (C.M.A. 1952).

5. "These rules are well founded on considerations of public policy. To relieve one who shares a common purpose to commit a felony, and actually assists in its perpetration, from the penalty extracted therefor, merely because his assigned role in the total scheme does not encompass action as to all elements of the offense, is contrary to both reason and justice." United States v. Jacobs, supra.

B. Presence.

1. Not necessary. Presence at the scene of a crime is not necessary to make one a party to the crime and liable as a principal, as military law recognizes one can be guilty as an accessory before the fact.

2. Mere presence not enough. Mere presence at the scene of crime does not make one a principal. MCM, 1984, Part IV, para. 1b(3).

a. United States v. Waluski, 21 C.M.R. 46 (C.M.A. 1956). Accused and Hart wrongfully appropriated a jeep. Hart drove at a high rate of speed and killed a pedestrian. Accused's conviction for involuntary manslaughter reversed. Evidence did not establish that the accused aided or abetted Hart in the homicide. Accused's participation in the wrongful appropriation of the jeep was insufficient "to provide a basis for an inference that the passenger aided, abetted or gave encouragement to the driver in the culpably negligent operation of the vehicle."

b. United States v. Johnson, 19 C.M.R. 146 (C.M.A. 1955). Accused and some friends were walking down a street when several of the friends accosted and robbed a passerby. The accused did nothing. Conviction for robbery as aider and abettor reversed. The accused had no agreement and no concert of purpose with the perpetrators nor did he give them any encouragement.

c. United States v. Guest, 11 C.M.R. 147 (C.M.A. 1953). Accused and Gephart hitched a ride in a jeep. After a few minutes Gephart shot and killed the driver. Gephart then buried the body, and the accused and Gephart left the scene in the jeep. The next day the accused was present when Gephart discussed selling the jeep to Pak. Accused was acquitted of murder, but found guilty of larceny. Conviction for larceny reversed. Although the accused was present at the scene of the murder and when the sale of the jeep was discussed, he did nothing to encourage or aid the murder or the larceny.

d. United States v. Shelley, 19 M.J. 325 (C.M.A. 1985). Mere presence in a misappropriated vehicle does not make the accused liable as a principle.

3. Presence and something more.

a. United States v. Smith, 26 C.M.R. 97 (C.M.A. 1958). Accused and others hot-wired first vehicle, but it would not start. A second vehicle was hot-wired and the group departed in it. The second car broke down. Accused discussed stealing third car with others, and that was accomplished. Accused was guilty of wrongful appropriation of second and third vehicles. His participation was sufficient to go beyond mere presence.

b. United States v. Patterson, 21 C.M.R. 135 (C.M.A. 1956). An accused, who blocked a door with the intent of preventing the escape of the victim from his assailant, was aiding and abetting the assailant and equally guilty.

c. United States v. Wooten, 3 C.M.R. 92 (C.M.A. 1952). Accused met Grueschow, who stated "he would like to have some ODs." Darling had earlier informed the accused that he would "like to get rid of some stuff." The accused informed Darling of Grueschow's desires, and Darling transferred a quantity of military trousers to Grueschow. The accused subsequently asked Grueschow for money. Accused aided and abetted the larceny. The accused brought two individuals together who were "bent on mischief" with "a view to promoting or instigating the commission of a crime." His demand for money "tends strongly to show that he had sufficiently associated himself with the venture and that a community of purpose existed."

d. United States v. Jacobs, 2 C.M.R. 115 (C.M.A. 1952). Accused and three others broke into a private home. Accused participated in assault on occupant, but did not actually take property from victim. Others did so. Conviction for robbery affirmed. The "assault provides the necessary act of assistance, and accordingly we have before us much more than mere presence at the scene of the crime."

e. United States v. Hatchett, 46 C.M.R. 1239 (N.C.M.R. 1973). Hitchhiker sat in back seat of vehicle between accused and active perpetrator. As car moved along, active perpetrator robbed victim. Accused was guilty of robbery. He was with the robbers when they were apprehended one hour later; he was aware the victim was given ride in order to be robbed; and his presence in the rear seat of the vehicle "ensured the victim could not escape."

f. United States v. Johnson, CM 437963 (A.C.M.R. 17 Aug 1979) (unpub.). Accused acted as lookout for his friends as they committed a rape and warned them that "their actions may be visible to passersby." Conviction for rape affirmed. Evidence affirmatively established accused aided and encouraged active perpetrators and that he "clearly shared in their criminal scheme."

g. United States v. Mazur, 13 M.J. 143 (C.M.A. 1982). Furnishing a narcotic and assisting in injecting it is sufficient involvement to make one a principal to use of narcotics; and, when death results from the injection, a principal to involuntary manslaughter. Death is a foreseeable consequence of the injection of an illegal narcotic. Foreseeability is an objective, not subjective, test. See United States v. Henderson, 23 M.J. 77 (C.M.A. 1986) (providing drug, a private room to use it, encouraging use, and being present when used sufficient to establish accused's guilt for involuntary manslaughter).

h. United States v. Sargent, 18 M.J. 331 (C.M.A. 1984). A conviction for manslaughter cannot be upheld merely on evidence that the accused sold the drugs to the deceased - where there was no direct assistance in administering the drugs, or any other act directly affecting the person. When a death results from the sale or transfer of a drug, however, that is an aggravating factor which may be presented by the prosecution in the presentencing phase of the trial.

i. United States v. Dunn, 27 M.J. 624 (A.F.C.M.R. 1988). Accused's presence at the scene of a shoplifting, perpetrated as part of the accused's criminal training, was sufficient to establish his guilt for larceny as an aider and abettor.

j. United States v. Pritchett, 31 M.J. 213 (C.M.A. 1990) (discusses several circumstances supporting the accused's guilt of drug offenses as an aider and abettor).

k. United States v. Speer, 36 M.J. 997 (A.C.M.R. 1993). Accused's participation in narcotics transaction which consisted largely of accepting money from undercover officer after female accomplice had negotiated transaction, delivered drugs, and left the room was sufficient to constitute aiding and abetting drug distribution.

4. Presence not necessary.

a. United States v. Carter, 23 C.M.R. 872 (A.F.B.R. 1957). Accused loaned his car to a friend with the knowledge that it was going to be used in the commission of a larceny. Accused is guilty of larceny on aiding and abetting theory even though he did not know all the details of how the crime was to be committed.

b. United States v. Bolden, 28 M.J. 127 (C.M.A. 1989). The accused and airman entered into a scheme where the airman would receive undeserved payments of quarters allowances based upon sham marriage. The accused is guilty of larceny as an aider and abettor.

C. Liability For Other Offenses.

1. The statutory principal is criminally liable for all offenses embraced by the common venture and for offenses likely to result as a natural and probable consequence of the offense directly intended. MCM, 1984, Part IV, para. 1b(5).

2. United States v. Waluski, 21 C.M.R. 46 (C.M.A. 1956). Accused and Hart stole a jeep. Hart drove away from scene at high rate of speed and ran over a pedestrian, killing him. No evidence that accused actively encouraged or aided and abetted the operation of the vehicle. Accused cannot be convicted of involuntary manslaughter.

3. United States v. Cowan, 12 C.M.R. 374 (A.B.R. 1953). Reed advised Cowan that he could obtain an obscene film for Cowan's unit and stated, "It'll cost you." Cowan then solicited 10 cents from each prospective viewer. Reed's conviction for soliciting and accepting money from enlisted men for the showing of the film was affirmed. The solicitation of the donations was a natural and probable consequence of his actions and his participation in the venture.

4. United States v. Self, 13 C.M.R. 227 (A.B.R. 1953). Accused and co-accused wrongfully appropriated vehicle and drove away. When stopped at a check point, co-accused shot and killed a sentinel. Accused did nothing during the events at the check point. Accused's conviction for murder reversed and charges dismissed. "[W]here an accused is party to a conspiracy or has combined with others in the perpetration of an unlawful act under such circumstances as will, when tested by experience, probably result in the taking of human life, he is equally responsible for a homicide flowing as a natural consequence of such unlawful combination as is his confederate who actually did the killing." The larceny of the vehicle, however, was not "so desperate a design that its execution might naturally or probably result in the taking of human life."

5. See the discussion of felony murder, infra, chapter 3, section III.

D. Different Degrees of Culpability.

1. "It is possible that the aider and abettor, although sharing a common purpose with the perpetrator, may entertain an intent or state of mind either more or less culpable than that of the perpetrator, in which event he may be guilty of an offense of either greater or less seriousness than the perpetrator." MCM, 1984, Part IV, para. 1b(4).

2. United States v. Patterson, 21 C.M.R. 135 (C.M.A. 1956). Accused pulled victim to the floor, after which Gilbreath

hit victim with chair. Several minutes later Gilbreath assaulted victim with fists and then swung belt buckle at him, hitting victim several times in the face with the buckle. Victim tried to flee; however, accused blocked access to the door. Conviction for aggravated assault affirmed. Notwithstanding accused's claim that he did not intend that an aggravated assault be committed, his participation in both assaults belies his claim.

3. United States v. Jackson, 19 C.M.R. 319 (C.M.A. 1955). Accused and Burns, armed with knives, attacked the victim. Burns stabbed the victim, who subsequently died. Conviction for unpremeditated murder reversed for failure to instruct on lesser included offense of involuntary manslaughter. Factfinder may infer that Burns entertained the intent to kill or do great bodily harm, and he thus may be properly convicted of murder; however, the accused may not have entertained such an intent, even though he participated in the assault.

4. United States v. Fullen, 1 M.J. 853 (A.F.C.M.R. 1976). Accused agreed to lure the victim to a dark area where he would be grabbed and his money taken. The accused lured the victim to the dark area, where the victim was beaten on the head with a pipe, and the accused then took the victim's wallet, which contained nine dollars. Conviction for robbery affirmed. The accused's argument that he only intended to steal the money and therefore could only be found guilty of larceny, even though his accomplices could be found guilty of robbery, is in the abstract a sound legal argument; however, because the accused intended that the victim be grabbed, he had in fact agreed to commit robbery.

5. Effect of acquittal of active perpetrator.

a. United States v. Duffy, 47 C.M.R. 658 (A.C.M.R. 1973). Accused ordered Sergeant L to shoot a prisoner. Sergeant L did so, but was acquitted of homicide at his trial on grounds of lack of mental responsibility. The accused was convicted of involuntary manslaughter. Conviction affirmed. The acquittal of the active perpetrator has no effect on the conviction of the accused.

b. United States v. Crocker, 35 C.M.R. 725 (A.F.B.R. 1964). Accused and Holloway engaged in assault with a knife upon the victim. The evidence established that Holloway fatally stabbed the victim. Holloway was acquitted of murder, but found guilty of aggravated assault. The accused was convicted of murder. Affirmed. The acquittal of the active perpetrator has no effect on the accused's case.

c. Standefer v. United States, 447 U.S. 10 (1980). We granted certiorari in this case to decide whether a defendant accused of aiding and abetting in the commission of a federal offense may be convicted after the named principal has been

acquitted of that offense. . . .

The indictment charged that petitioner, as head of Gulf Oil Company's tax department, had authorized payments for five vacation trips to Cyril Niederberger who was then the Internal Revenue Service agent in charge of the audits of Gulf's federal income tax returns." Niederberger was convicted of some offenses involving these vacation trips and acquitted of others. Standefer was charged inter alia with aiding and abetting Niederberger in the commission of these offenses, including those for which Niederberger was acquitted. Standefer moved to dismiss the latter charges arguing "that because Niederberger, the only named principal, had been acquitted of accepting unlawful compensation as to those vacations, he could not be convicted of aiding and abetting in the commission of those offenses.

Because at early common law all parties to a felony received the death penalty, certain procedural rules developed tending to shield accessories from punishment . . . . Among them was one of special relevance to this case: the rule that an accessory could not be convicted without the prior conviction of the principal offender. . . . This procedural bar applied only to the prosecution of accessories in felony cases. In misdemeanor cases, where all participants were deemed principals, a prior acquittal of the actual perpetrator did not prevent the subsequent conviction of a person who rendered assistance.

To overcome these judge-made rules, statutes were enacted in England and in the United States. . . . The enactment of 18 U.S.C. § 2 in 1909 was part and parcel of this same reform movement. . . . Read against its common-law background the provision evinces a clear intent to permit the conviction of accessories to federal criminal offenses despite the prior acquittal of the actual perpetrator of the offense. It gives general effect to what had always been the rule for second-degree principals and for all misdemeants.

The legislative history of 18 U.S.C. § 2 as presently amended plainly rebuts petitioners contention that § 2 was not intended to authorize conviction of an aider and abettor after the principal had been acquitted of the offense charged. With the enactment of that section, all participants in conduct violating a federal criminal statute are 'principals.' As such, they are punishable for their criminal conduct; the fate of other participants is irrelevant. Conviction affirmed.

d. One may be a principal, even if the perpetrator is not identified or prosecuted, or is acquitted. MCM, 1984, Part IV, para. 1b(6).

6. Status of active perpetrator.

United States v. Minor, 11 M.J. 608 (A.C.M.R. 1981). Minor forced a German national to commit sodomy upon another German national. Held: The amenability of the actual perpetrator to prosecution is not a requirement for criminal liability as an aider and abetter. Thus, the accused was properly convicted even though the active perpetrator was not subject to the UCMJ. Accord United States v. Michaels, 3 M.J. 846 (A.C.M.R. 1977) (accessory after the fact); United States v. Blevins, 34 C.M.R. 967 (A.F.B.R. 1964).

E. Duty To Interfere.

1. Failing to interfere and stop a crime generally does not constitute aiding and abetting unless the person has a duty to interfere, such as a security guard.

2. United States v. Lyons, 28 C.M.R. 292 (C.M.A. 1959). Accused was a guard on a supply truck. He was offered $1,000 to see nothing. He accepted. The truck went past its destination, and its occupants met several local nationals. Eventually the cargo was returned to military control. Conviction for larceny reversed. The accused was not told why he was offered the money. No evidence was presented which "establish[ed] a conscious sharing of the alleged intent of the co-actors. . . . It is no more than sheerest speculation to contend there is a sufficient showing that he participated in the venture as something he desired to bring about."

3. United States v. McCarthy, 29 C.M.R. 574 (C.M.A. 1960). The accused, a first lieutenant, offered several enlisted men a ride to the post from an off-post night club. Before departing, two of the individuals informed the accused that they would get him hub caps for his vehicle. The accused advised them not to do it, but the pair secured the hub caps from a nearby automobile, placed them in the accused's vehicle, and departed. Subsequently one of the individuals removed the hub caps and threw them away. Conviction for larceny reversed. "The mere failure of an officer to take active measures to prevent the commission of an offense in his presence does not permit the inference that he shared the criminal design of the actual perpetrators. . . . The failure to take affirmative measures to prevent the commission of the larceny does not in any way establish guilt as a principal."

4. United States v. Ford, 30 C.M.R. 31 (C.M.A. 1960). Accused, a security patrolman, discovered an open warehouse. Instead of reporting it to the desk sergeant, he informed two other patrolmen and joined them at the warehouse. While the accused and another patrolman waited outside, two patrolmen entered and returned with two typewriters. The four drove to another location and discussed dividing up the stolen property. The accused declined to keep a typewriter. Conviction for larceny affirmed.

The accused's activities show more than mere presence or mere failure to interfere. "The evidence supports the conclusion that if the accused did not actually participate in the crime he at least actively encouraged its commission."

5. United States v. Cross, 30 C.M.R. 509 (A.B.R. 1960). Accused stood by and did nothing while gasoline was siphoned from the fuel tank of his military vehicle. Plea of guilty improvident. The accused cannot be found guilty of larceny merely because he stood by and took no action to prevent the larceny of the gasoline. Even if the accused had a duty to interfere, he is not guilty as a principal "unless it can be shown that he associated himself with those engaging in the unlawful act charged."

6. United States v. Crouch, 11 M.J. 128 (C.M.A. 1981). Accused, a guard at a motor pool, stood by and let his friends enter the motor pool to steal tools. While they were in the motor pool, the accused told the military police that a nearby van belonged to a friend who would move it shortly. Conviction for larceny and unlawful entry affirmed. Mere presence at the scene does not make one liable as a participant in the crime even if he is a guard or sentry; however, the evidence establishes that the accused participated in the venture as something he wished to bring about. But see United States v. Fuller, 25 M.J. 514 (A.C.M.R. 1987) (fuel handler had no duty to stop accused from burning barracks room).

7. United States v. Epps, 25 M.J. 319 (C.M.A. 1987). Failure to stop barracks larceny did not make the accused an aider or abettor.

8. Duty to report crimes. See United States v. Thompson, 22 M.J. 40 (C.M.A. 1986); United States v. Heyward, 22 M.J. 35 (C.M.A. 1985); United States v. Gonzales, 19 M.J. 951 (A.F.C.M.R. 1985).

F. Pleading.

1. When a person has not himself directly committed an offense but is liable for its commission as a principal under UCMJ art. 77, he may be charged as though he himself had committed the acts which constitute the offense. R.C.M. 307(c)(3) discussion, para. H(i).

2. United States v. Petree, 23 C.M.R. 233 (C.M.A. 1957). Specification alleged "being a passenger in a vehicle at the time of an accident did . . . wrongfully and unlawfully leave the scene of the accident without making his identity known." Conviction reversed for failure to state an offense. For pleading purposes, "an aider or abettor may properly be charged as if he himself had directly committed the offense as a principal. . . . It is not necessary to set out the facts by which an accused aided

and abetted or advised and procured the commission of a crime. . . . The specification need not allege facts independent from those required to be alleged against the principal." In this case the specification alleged the accused was a passenger, not the driver. "[I]n the absence of any allegation that the accused was the driver of the vehicle, or that as a passenger he aided and abetted the driver in unlawfully fleeing the scene of an accident, the specification wholly fails to allege an offense."

3. United States v. Vidal, 23 M.J. 319 (C.M.A. 1987). Accused could be convicted for actually raping the victim or for driving the car while his companion raped the woman in the back seat; see United States v, Dayton, 29 M.J. 6 (C.M.A. 1989) (government is entitled to prosecute the accused on the alternate theories that he is guilty as a perpetrator or as an aider and abettor); United States v. Westmoreland, 31 M.J. 160 (C.M.A. 1990) (judge can instruct, and accused can be convicted, under an aiding and abetting theory, even if both counsel feel the theory was not raised).

G. Counseling, Commanding, Procuring, Solicitation.

1. One who counsels, commands or procures another to commit an offense subsequently perpetrated in consequence of that counsel, command or procuring is a principal whether he is present or absent at the commission of the offense. MCM, 1984, Part IV, paras. 1b(2) and (3).

2. The elements of solicitation (DA Pam 27-9, para. 3-178) require only the invitation to commit crime. Guilt as a principal for counseling, commanding, or procuring requires a completed crime. But solicitation is a specific intent crime. United States v. Mitchell, 15 M.J. 214 (C.M.A. 1983); accord United States v. Taylor, 23 M.J. 314 (C.M.A. 1987).

3. Guilt for solicitation does not turn on who first launched the words of invitation. United States v. Orostin, 30 M.J. 520 (A.F.C.M.R. 1990).

4. A principal may be punished in the same manner as the active perpetrator for the crime committed, but one guilty of solicitation may only be punished as one guilty of the completed offense up to a maximum of five years confinement. MCM, 1984, Part IV, para. 105(c).

5. Solicitation and the completed crime are not multiplicious for sentencing purposes. United States v. Irving, 3 M.J. 6 (C.M.A. 1977).

6. Solicitation held a lesser included offense of attempted sale of marijuana. United States v. Jackson, 5 M.J. 765 (A.C.M.R. 1978).

7. Specification alleging "did . . . wrongfully solicit . . . to possess marihuana . . . ." properly alleges an offense although specification does not specifically allege that the possession was wrongful. United States v. Dupree, 10 M.J. 634 (A.C.M.R. 1980); see United States v. Brewster, 32 M.J. 591 (A.C.M.R. 1991) (amending specification charging solicitation to commit rape by adding the word "wrongfully" was a minor change).

H. Causing An Act To Be Done.

1. United States v. Seberg, 5 M.J. 895 (A.F.C.M.R. 1978). A conviction for violating a regulation by using the mails in the name of another was reversed. Although the accused "caused another qualified service member to use the mails as part of a black market scheme, the actual use by the other was lawful." See United States v. Sneed, 38 C.M.R. 249 (C.M.A. 1968).

2. United States v. Minor, 11 M.J. 608 (A.C.M.R. 1981). Specification alleged that the accused committed sodomy "by forcing Harry T. . . to commit sodomy upon Brigitte S. . . ." During the providence hearing the accused stated that McCray threatened Harry T. and the accused merely encouraged Harry T. to commit the act. Held: By his words of encouragement the accused "made himself a party to the threat" and was equally guilty.

I. Withdrawal As A Principal.

A person may withdraw from a common venture or design and avoid liability for any offenses committed after the withdrawal. To be effective the withdrawal must:

1. occur before the offense is committed;

2. effectively countermand or negate the assistance, encouragement, advice, instigation, counsel, command, or procurement; and

3. be clearly communicated to the would-be perpetrators or to appropriate law enforcement authorities in time for the perpetrators to abandon the plan or for law enforcement authorities to prevent the offense. MCM, 1984, Part IV, para. 1b(7).

II. ACCESSORY AFTER THE FACT. UCMJ art. 78.

A. Defined. "Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment shall be punished as a court-martial may direct." UCMJ art. 78.

B. Not A Lesser Included Offense--Must be Charged. United States v. Price, 34 C.M.R. 516 (A.B.R. 1963); but see United States v. Michaels, 3 M.J. 846 (A.C.M.R. 1977).

C. Acquittal of the Primary Actor Is No Defense. United States v. Marsh, 32 C.M.R. 252 (C.M.A. 1962).

D. Primary Actor Need Not Be One Subject To The UCMJ. United States v. Blevins, 34 C.M.R. 967 (A.F.B.R. 1964).

E. Accused With Responsibility To Protect Particular Property. Accused an accessory after the fact when he accepts money not to disclose completed larcenies that he discovered. United States v. Michaels, 3 M.J. 846 (A.C.M.R. 1977).

F. Responsibility As A Principal Distinguished From That Of Accessory After The Fact.

1. Act of principal must occur before or during the crime, or participate in a plan before the crime to perform an act in furtherance of it after the crime. One who is not a party to the original larceny scheme but who after the theft removes purloined goods from a cache is an accessory after the fact. United States v. Greener, 1 M.J. 1111 (N.C.M.R. 1977).

2. Notwithstanding that larceny is a continuing offense, accused may be convicted of accessory after the fact when, with the intent to assist the active perpetrator avoid detention and prosecution, he advises the active perpetrator to destroy the stolen property. United States v. Manuel, 8 M.J. 822 (A.F.C.M.R. 1979).

G. Responsibility As An Accessory After The Fact Distinguished From Misprision Of A Felony.

1. One can be an accessory to an offense, but misprision requires a felony.

2. An accessory must "receive," "comfort" or "assist" the perpetrator in order to hinder or prevent the criminal's apprehension, trial or punishment. One guilty of misprision must do a positive or affirmative act to conceal the felony and fail to make it known to authorities. DA Pam 27-9, para. 3-163.

H. Acts Sufficient For Accessory After The Fact. United States v. Foushee, 13 M.J. 833 (A.C.M.R. 1982) (where evidence showed only that the accused knew the principle perpetrator had stabbed the victim with the knife, but did not know the perpetrator intended to kill or inflict grievous bodily harm, accused could be convicted of being accessory after the fact only to assault with a dangerous weapon, not assault with intent to murder); United States v. Marsh, 32 C.M.R. 252 (C.M.A. 1962) (advising perpetrator

of theft to get rid of stolen goods and thereafter consuming liquor bought with proceeds); United States v. Tamas, 20 C.M.R. 218 (C.M.A. 1955) (concealing and holding proceeds of a theft); United States v. Blevins, 34 C.M.R. 967 (A.F.B.R. 1964) (concealing and transporting proceeds of theft); see United States v. Wright, 22 M.J. 25 (C.M.A. 1986).

I. **Acts Insufficient For Misprision.** United States v. Maclin, 27 C.M.R. 590 (A.B.R. 1958) (accused who was buying stolen property did not know the prior theft was a felony); United States v. Assey, 9 C.M.R. 732 (A.F.B.R. 1953) (lending money to larceny perpetrator to replace goods latter had stolen was not an "affirmative act of concealment" by the accused).

III. LESSER INCLUDED OFFENSES. UCMJ art. 79.

A. Introduction.

1. "An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein." UCMJ art. 79.

2. A lesser offense is included in a charged offense when the specification contains allegations which either expressly or by fair implication put the accused on notice to be prepared to defend against it in addition to the offense specifically charged. This requirement of notice may be met when:

a. All of the elements of the lesser offense are included in the greater offense, and the common elements are identical (for example, larceny as a lesser included offense of robbery);

b. All of the elements of the lesser offense are included in the greater offense, but one or more elements is legally less serious (for example, housebreaking as lesser included offense of burglary); or

c. All of the elements of the lesser offense are included and necessary parts of the greater offense, but the mental element is legally less serious (for example, wrongful appropriation as a lesser included offense of larceny).

The notice requirement may also be met, depending on the allegations in the specification, even though an included offense requires proof of an element not required in the offense charged. For example, assault with a dangerous weapon may be included in a robbery. MCM, 1984, Part IV, para. 2b(1).

3. When the offense charged is a compound offense comprising two or more included offenses, an accused may be found guilty of any or all of the offenses included in the offense charged. For example, robbery includes both larceny and assault. Therefore, in a proper case, a court-martial may find an accused not guilty of robbery, but guilty of wrongful appropriation and assault. MCM, 1984, Part IV, para. 2b(2).

B. Evolution Of The Doctrine.

1. Lesser included offense doctrine was developed at common law to assist the prosecution in cases where evidence failed to establish some element of the offense original charged; instruction on lesser-included offense, when warranted, serves both the defense and the prosecution. United States v. Emmons, 31 M.J. 108 (C.M.A. 1990), review denied 32 M.J. 487.

2. The language of Article 79 is virtually identical to the language of Fed.R.Crim.P. 31(c). The Court of Military Appeals has consistently construed this statute and its "necessarily included" language to mean offenses which are "fairly embraced" in the pleadings and proof of the greater offense. See United States v. Baker, 14 M.J. 361 (C.M.A. 1983). But see, United States v. Teters, 37 M.J. 370 (C.M.A. 1993), below.

3. In 1989, the Supreme court, although, acknowledging divergent views by the Circuits on the scope of this Federal rule, definitively held that Fed.R.Crim.P. 31(c) should be construed to include only lesser-included offenses as established by their statutory elements. Schmuck v. United States, 489 U.S. 705, 109 S. Ct. 1443, 103 L.Ed.2d. 734 (1989).

4. In United States v. Teters, 37 M.J. 370, 376 (C.M.A. 1993), the Court of Military Appeals stated, "In view of the identity of language of Article 79 and Fed.R.Crim.P. 31(c), we will apply the Supreme Court's more recent holding and abandon the 'fairly embraced' test for determining lesser-included offenses as a matter of law."

5. For a detailed discussion on the impact of Teters on the law of lesser included offenses, see generally Holland & Hunter, United States v. Teters: More Than Meets the Eye?, The Army Lawyer, Jan. 1994, at 16.

CHAPTER 2

PRELIMINARY OR INCHOATE CRIMES

I. **ATTEMPTS.** UCMJ art. 80.

A. Introduction.

1. "An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense." UCMJ art. 80.

2. Elements.

a. That the accused did a certain overt act;

b. That the act was done with the specific intent to commit a certain offense under the code;

c. That the act amounted to more than mere preparation; and

d. That the act apparently tended to effect the commission of the intended offense.

B. Overt Act.

1. An overt act is required.

2. The act need not be alleged in the specification. United States v. Marshall, 40 C.M.R. 138 (C.M.A. 1969). Specification which alleges in part, ". . . fraudulently attempt to procure himself to be separated from the United States Army," is legally sufficient although it does not allege the specific overt act. See United States v. Mobley, 31 M.J. 273 (C.M.A. 1990); see generally TJAGSA Practice Note, Alleging the Overt Act in an Attempt Specification, The Army Lawyer, Mar. 1991, at 23 (discusses Mobley).

3. Overt act need not be illegal. United States v. Johnson, 22 C.M.R. 278 (C.M.A. 1957). While on pass in West Germany, accused headed towards East Germany with intent to desert. Apprehended while still within the limits of the pass. Cannot be found guilty of desertion, but evidence sufficient to prove attempted desertion.

C. Specific Intent.

1. The overt act must be done with the specific intent to commit an offense under the UCMJ.

2. United States v. Dominguez, 22 C.M.R. 275 (C.M.A. 1957). Accused used syringe and injected himself with substance he believed to be a narcotic. Accused intended to inject narcotic, and means used were adapted for the commission of the crime. Conviction for attempt affirmed.

3. United States v. Sampson, 7 M.J. 513 (A.C.M.R.), pet. denied, 7 M.J. 468 (C.M.A. 1979). Accused, while nude, broke and entered a private dwelling at night, approached a nude female occupant, and reached towards her neck and shoulder with his hand. Evidence did not establish the intent to commit rape. Evidence establishes "a generalized evil desire for gratification;" however, this is "not sufficient to establish the specific intent required to prove an attempted rape." Evidence is "as consistent with a scenario of indecent assault and exhibitionism as it is with a scenario of rape."

4. United States v. Collier, 3 M.J. 932 (A.C.M.R. 1977), pet. denied, 5 M.J. 155 (C.M.A. 1978). Accused pleaded guilty to attempted sale of heroin. During the providence inquiry he stated that he knew he was selling brown sugar and not heroin. Plea is improvident because accused did not have the requisite intent to sell heroin.

5. United States v. Williams, 3 M.J. 555 (A.C.M.R. 1977), reversed on other grounds, 4 M.J. 336 (C.M.A. 1978). Accused sold plastic chips, claiming they were LSD. Accused knew correct nature of the substance. Accused cannot be found guilty of attempted sale of LSD because he had no intent to sell LSD.

6. United States v. Giles, 42 C.M.R. 960 (A.F.C.M.R. 1970). Accused smoked and transferred "Johnson grass" while believing substance was not marijuana. Because the accused did not believe the substance to be marijuana, he cannot be found guilty of attempted sale and transfer.

7. United States v. Roa, 12 M.J. 210 (C.M.A. 1982). Attempted murder requires specific intent to kill, although murder may require a lesser intent. Accord United States v. Allen, 21 M.J. 72 (C.M.A. 1985).

8. United States v. Foster, 14 M.J. 246 (C.M.A. 1982). To prove attempted violation of a lawful general regulation (UCMJ art. 92(1)), proving an intent to violate the regulation or knowledge of the regulation is unnecessary. Specific intent to commit the act prohibited by the regulation is sufficient.

9. United States v. Powell, 24 M.J. 603 (A.F.C.M.R. 1987). An attempt is a frustrated effort to intentionally commit a specific crime.

D. More Than Mere Preparation.

1. "Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement towards the commission of the offense." MCM, 1984, Part IV, para. 4c(2).

2. An attempt is the direct movement towards the commission of the offense after the preparations are made. United States v. Jackson, 5 M.J. 765 (A.C.M.R.), pet. denied, 16 M.J. 27 (C.M.A. 1978).

3. For the accused to be guilty of an attempt, the overt acts tending toward commission of the consummated offense must amount to more than mere preparation and constitute at least the beginning of its effectuation. The test is whether the accused has made a direct movement toward committing the offense. United States v. Reid, 31 C.M.R. 83 (C.M.A. 1961).

4. The act need not be the final step leading to the consummation of the offense. United States v. Buchanan, 49 C.M.R. 620 (A.C.M.R. 1974).

5. The line of demarcation between preparation and a direct movement towards the offense is not always clear. Primarily the difference is one of fact, not law. United States v. Choat, 21 C.M.R. 313 (C.M.A. 1956).

6. Words alone (a request to conduct a hernia examination) constituted an overt act more than mere preparation for a charge of attempted indecent assault. United States v. Brantner, 28 M.J. 941 (N.M.C.M.R. 1989).

7. Substantial step test. The overt act must be a "substantial step" toward the commission of the crime. The substantial step must be strongly corroborative of the firmness of the accused's intent.

a. United States v. Byrd, 24 M.J. 286 (C.M.A. 1987). Accepting money from undercover agent and riding to an off-post location to purchase drugs was not a substantial step.

b. United States v. Presto, 24 M.J. 350 (C.M.A. 1987). Placing phone calls to drug supplier and checking on status of deal was not a substantial step.

c. United States v. LaProuse, 26 M.J. 652 (A.C.M.R. 1988). Offering to pay two boys to remove their trousers was an overt act more than mere preparation for attempted indecent liberties.

d. United States v. Church, 29 M.J. 679 (A.F.C.M.R. 1989), aff'd, 32 M.J. 70 (C.M.A. 1991). Planning wife's murder, hiring undercover agent to kill wife, making partial payment for killing, providing photo of wife and schedule of activities to agent and approving murder weapon were overt acts more than mere preparation for attempted premeditated murder.

e. United States v. Jones, 32 M.J. 430 (C.M.A. 1991). Conduct amounted to a substantial step towards commission of larceny from insurance company where accused solicited another to destroy his car, made plans to destroy it, and finally delivered the car and its keys to that person on the agreed day of the auto's destruction.

E. Tending to Effect the Commission of the Offense.

United States v. Johnson, 22 C.M.R. 278 (C.M.A. 1957). The "overt act" need not be the ultimate step in the consummation of the crime. The act is sufficient if it is one which, in the ordinary and likely course of events, would, if not interrupted by extraneous causes, result in the commission of the offense itself. E.g. United States v. Gugliotta, 23 M.J. 905 (N.M.C.M.R. 1987) (overt act sufficient to constitute direct movement to commission of robbery where accused and accomplices made plans, procured implements, and went to the site of the crime with the tools for purpose of robbing exchange).

F. Impossibility.

1. "An accused may be guilty of an attempt to commit an offense when he engages in conduct which would constitute the crime or directly tend to do so, if the attendant facts and legal relationships were as he believed them to be." MCM, 1984, Part IV, para. 4c(3).

2. If the facts and circumstances were as the accused believed them to be and if under those facts and circumstances the accused's intended act would constitute a crime, he may be found guilty of an attempt to commit the intended crime, even though it was impossible to commit the intended crime under the facts and circumstances as they actually were. But see United States v. Richardson, 30 M.J. 1239 (A.C.M.R. 1990) (impossibility may act as a defense to crimes other than attempt).

3. United States v. Thomas, 32 C.M.R. 278 (C.M.A. 1962). The accused and two companions committed sexual intercourse with a female, whom they believed to be unconscious, under circumstances which amounted to rape. The female, however, was dead at the time the intercourse was committed. Conviction for attempted rape affirmed. Although under the circumstances the accused could not have committed rape, had the facts been as the accused believed them to be (that the female was alive) he could have been convicted of rape. Therefore, the defense of impossibility is not applicable.

4. United States v. Keenan, 39 C.M.R. 108 (C.M.A. 1969). Accused shot at woman, believing she was already dead. Accused charged with attempted murder. "Military law has tended toward the advanced and modern position that holds one accountable for conduct which would constitute a crime if the facts were as he believed them to be." Because the accused believed the victim to be dead, he may not be convicted of attempted murder.

5. United States v. Wilson, 7 M.J. 997 (A.C.M.R. 1979). Accused came upon another person who was unconscious. Beside the person was a hypodermic needle and syringe used by him to inject heroin. The accused destroyed the needle and syringe to hinder or prevent the person's apprehension for use and possession of narcotics. Because this person was probably dead at the time the items were destroyed, the accused cannot be found guilty of accessory after the fact in violation of UCMJ art. 78. Because the accused believed the person was alive at the time he destroyed the needle and syringe, however, he may be found guilty of attempted accessory after the fact.

6. United States v. Longtin, 7 M.J. 784 (A.C.M.R. 1979). Accused sold a substance which he believed to be opium, as opium. The laboratory test was inconclusive, and the Government could not prove opium was sold. The accused claimed that under the circumstances it was impossible for him to sell opium and therefore he could not be convicted of attempted sale of opium. Conviction for attempted sale of opium affirmed. The accused believed he was selling opium, and had the facts and circumstances been as he believed them to be, he could have been convicted of sale of opium. Therefore, the defense of impossibility does not apply.

7. United States v. Church, 29 M.J. 679 (A.F.C.M.R. 1989) aff'd 32 M.J. 70 (C.M.A. 1991). Evidence supported the accused's conviction for attempted premeditated murder of his wife, although the person he hired to kill his wife was an undercover agent.

8. See also United States v. LaFontant, 16 M.J. 236 (C.M.A. 1983).

G. Abandonment.

1. Old rule. United States v. Valenzuela, 15 M.J. 699 (A.C.M.R. 1983). Military law does not recognize a defense of voluntary abandonment. Even if the attempt is abandoned before completion, and no outside cause or fear of detection prompts the abandonment, it is not a defense to an attempt charge. See also United States v. Barnes, 12 C.M.R. 735 (A.F.B.R. 1953). Abandonment, because of fear of detection and after more than mere planning and preliminary preparation occurs, is no defense.

2. New rule. United States v. Byrd, 24 M.J. 286 (C.M.A. 1987) (opinion of Everett, C.J.) (voluntary abandonment must be recognized as an affirmative defense to a charged attempt); see United States v. Walthers, 30 M.J. 829 (N.M.C.M.R. 1990) (defense allowed); United States v. Miller, 30 M.J. 999 (N.M.C.M.R. 1990) (defense not allowed because abandonment not caused by a genuine change of heart); United States v. Rios, 32 M.J. 501 (A.C.M.R. 1990) aff'd 33 M.J. 436 (C.M.A 1991) (defense not raised); United States v. Wilmouth 34 M.J. 739 (N.M.C.M.R. 1991) (defense unavailable where efforts to deliver classified information failed because of inability to locate agent not change of heart; United States v. Collier, 36 M.J. 501 (A.F.C.M.R. 1992) (defense unavailable when attempted murder has proceeded so far that injury results to victim). See generally TJAGSA Practice Note, Voluntary Abandonment as a Defense to Attempts, The Army Lawyer, Sep. 1990, at 32.

H. Pleading Defects.

1. Attempted drug offenses.

a. United States v. Showers, 45 C.M.R. 647 (A.C.M.R. 1972). "Specification: In that Private First Class Herman Showers . . . did . . . on or about 31 August 1971 attempt to sell some quantity of a habit forming drug, to wit: heroin." Specification is fatally defective because it fails to allege that the attempt was wrongful. Accord United States v. Brice, 38 C.M.R. 134 (C.M.A. 1967); but see United States v. Simpson, 25 M.J. 865 (A.C.M.R. 1988) (omission of the word "wrongful" from one of four drug distribution specifications not a fatal defect).

b. United States v. Guevara, 26 M.J. 779 (A.F.C.M.R. 1988). Conviction for attempted use of a controlled substance, alleged in the generic, affirmed. Accused intended to use some type of controlled substance.

2. Attempted robbery.

a. United States v. Hunt, 7 M.J. 985 (A.C.M.R. 1979). All elements of robbery must be alleged in an attempted robbery specification. Failure to allege that the attempted taking

was from the person or the presence of the victims was fatal to the offense of attempted robbery. Conviction of attempted larceny affirmed.

b. United States v. Wright, 35 C.M.R. 546 (A.B.R. 1964). All elements of robbery must be alleged in attempted robbery specification. Specification alleging "In that . . . attempted to commit the offense of robbery by entering the Wolfgang Roth Insurance and Loan Agency, wearing a mask and armed with a pistol," is fatally defective.

c. United States v. Ferguson, 2 M.J. 1225 (N.C.M.R. 1976). Specification alleging in part " attempt to rob a wallet, the property of Private First Class L.P. Hoge, U.S. Marine Corps," is fatally defective.

I. Lesser Included Offenses.

1. An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein. UCMJ art. 79.

2. United States v. Banks, 7 M.J. 501 (A.F.C.M.R. 1979). Attempted destruction of an Air Force jet plane is a lesser included offense of attempting to willfully damage the aircraft with intent to injure, interfere with, or obstruct the national defense of the United States. The latter is a violation of UCMJ art. 134 and 18 U.S.C. § 2155 (1982).

3. See also United States v. Wilson, 7 M.J. 997 (A.C.M.R. 1979).

4. United States v. Roa, 12 M.J. 210 (C.M.A. 1982). A specific intent is required to prove attempt even where completed offense is a general intent crime. Attempted negligent homicide, or attempted manslaughter by culpable negligence, are not offenses.

a. Punishment. The punishment for attempt under UCMJ art. 80 is the same as that for the intended offense except that in no case may the death penalty nor confinement at hard labor in excess of 20 years be imposed. MCM, 1984, Part IV, para. 4e.

b. The specification alleging the greater offense and the facts of the case put the defense on notice of the existence of the lesser offense of attempt.

c. Conviction of the lesser offense of attempt creates a double jeopardy right against prosecution for the greater offense.

d. The lesser and greater offenses are multiplicious.

e. See MCM, 1984, Part IV, para. 4(d).

5. Attempt and trial strategy in drug prosecutions.

a. Proof of the identity of the substance is not available at the time of trial in a drug case. United States v. Gray, 41 C.M.R. 756 (N.C.M.R. 1969) (affirming findings of guilty of attempted drug violation); accord United States v. Longtin, 7 M.J. 784 (A.C.M.R. 1979).

b. The laboratory report in a drug use case reveals the accused was shooting up powdered sugar. United States v. Dominguez, 22 C.M.R. 275 (C.M.A. 1957) (attempted use affirmed); United States v. Giles, 42 C.M.R. 960 (A.F.C.M.R. 1970) (accused who knows he has been deceived by seller, but nevertheless smokes substance hoping to achieve a "high," not guilty of attempted use).

c. The accused charged with sale of drugs was putting one over on the heroin buyer by selling him brown sugar. United States v. Collier, 3 M.J. 932 (A.C.M.R. 1977) (guilty plea to attempted transfer of heroin held improvident); United States v. Williams, 3 M.J. 555 (A.C.M.R. 1977) (guilty of larceny by false pretenses).

J. Other Recent Cases.

United States v. Santistevan, 25 M.J. 123 (C.M.A. 1987) (attempted kidnapping); United States v. Anderson, 27 M.J. 653 (A.C.M.R. 1988) (attempted wrongful appropriation); United States v. St. Fort, 26 M.J. 764 (A.C.M.R. 1988) (attempted adultery); United States v. Guillory, 36 M.J. 952 (A.C.M.R. 1993) (plea of guilty to attempt provident where inquiry establishes guilt to greater offense even though military judge did not advise accused of elements of attempt).

II. CONSPIRACY. UCMJ art. 81.

A. Introduction.

1. "Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct." UCMJ art. 81; see Yawn, Conspiracy, 51 Mil. L. Rev. 1 (1971).

2. Public policy rationale. Concerted criminal enterprise increases its chances of success and therefore poses a greater risk to society. To protect itself, society makes conspiracy a distinct crime punishable separately from the underlying offense. Callahan v. United States, 364 U.S. 587, 593-94 (1961).

B. Elements.

1. That the accused entered into an agreement with one or more persons to commit an offense under the code; and

2. That while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy. MCM, 1984, Part IV, para. 5(b).

C. The Agreement.

1. The agreement in a conspiracy need not be in any particular form nor manifested in any formal words. A sufficient agreement is constituted if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play. MCM, 1984, Part IV, para. 5c(2); accord United States v. Jackson, 20 M.J. 68 (C.M.A. 1985) (without saying a word, the accused joined into a conspiracy to commit larceny); United States v. Hewitt, 10 M.J. 561 (A.F.C.M.R. 1980).

2. Conspiracy is generally established by circumstantial evidence; usually the conduct of the parties. United States v. Layne, 29 M.J. 48 (C.M.A. 1989); United States v. Matias, 25 M.J. 356 (C.M.A. 1987); see United States v. Graalum, 19 C.M.R. 667, 697 (A.F.B.R. 1955) ("The agreement element of a conspiracy may be shown by conduct of the alleged co-conspirators, their declarations to or in the presence of each other, and other circumstantial evidence."); United States v. Barnes, 38 M.J. 72 (C.M.A. 1993).

3. One or many conspiracies.

a. United States v. Thompson, 21 M.J. 94 (C.M.A. 1985). An agrement to commit several offenses is ordinarily but a single conspiracy. The accused's agreement to commit three robberies was but a single conspiracy.

b. United States v. Kenny, 645 F.2d 1323 (9th Cir. 1981). The conspiracy alleged here takes the form of a wheel, with one central hub--Kenny--dealing with the "spokes"--the other

defendants--in individual transactions. See Kotteakos v. United States, 328 U.S. 750 (1946). Without more, we agree that such a fact pattern may suggest at most a cluster of separate conspiracies, rather than the "concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose" found in a single conspiracy. United States v. Monroe, 552 F.2d 860, 862-63 (9th Cir.), cert. denied, 431 U.S. 972 (1977). To follow the wheel metaphor, establishing a single conspiracy in a case such as this generally requires that the Government supply proof that the spokes are bound by a "rim"; that is, the circumstances must lead to an inference that some form of overall agreement exists.

The nature of that "rim" defies precise statement, but general principles are well established. The evidence must show that each of the defendants was involved. United States v. Beecroft, 608 F.2d 753 (9th Cir. 1979). A meeting of the minds must be demonstrated. United States v. Peterson, 549 F.2d 654 (9th Cir. 1977). Mere association and activity with a conspiracy is insufficient. United States v. Basurto, 497 F.2d 781, 793 (9th Cir. 1976). However, a formal agreement between the conspirators is not necessary. United States v. Camacho, 528 F.2d 464, 469 (9th Cir. 1976). The agreement may be inferred from the defendants' acts pursuant to the fraudulent scheme or other circumstantial evidence. United States v. Thomas, 586 F.2d 123, 132 (9th Cir. 1978); United States v. Oropeza, 564 F.2d 316, 321 (9th Cir. 1977); United States v. Anderson, 532 F.2d 1218 (9th Cir. 1976). "The government need not show direct contact or explicit agreement between the defendants. It is sufficient to show that each defendant knew or had reason to know of the scope of the conspiracy and that each defendant had reason to believe that their own benefits were dependent upon the success of the entire venture." United States v. Kostoff, 585 F.2d 378, 380 (9th Cir. 1978). Once the existence of a conspiracy has been established, evidence of only a slight connection is necessary to convict a defendant of knowing participation in it. United States v. Dunn, 564 F.2d 348, 357 (9th Cir. 1977).

c. United States v. Brown, 9 M.J. 599 (A.F.C.M.R. 1980). Accused was charged with conspiracy to steal runway matting. Thefts allegedly occurred on 8 October and 4, 8 and 11 November. Accused was present on 8 October and 4 November. No evidence was presented that the accused was present on 8 and 11 November. Moreover, the evidence established that the accused was hospitalized from 9 to 12 November. The conspiracy was proved by indirect evidence, principally the facts and circumstances of the thefts. The evidence established that the accused was present on 8 October and 4 November, directed the loading of the matting onto the Korean truck which was used, and acted as the security police escort officer both at the scene of the loading and when the truck drove off base. Accused's guilt of the 8 and 11 November thefts "rested on the indirect evidence of the conspiracy and his

involvement in the first two thefts. . . . The existence of a conspiracy may be proved by circumstantial evidence as well as by direct evidence. . . . During the existence of a conspiracy, each conspirator is liable for all the acts of other members of the conspiracy done in pursuance of the conspiracy unless he abandons or withdraws from the conspiracy. . . . Vicarious criminal liability as a conspirator is very similar to criminal liability as an aider and abettor, or co-actor, as both theories of criminal liability are closely intertwined. . . . Our difficulty is the paucity of evidence as to the scope and object of the conspiracy, the existence of which was only established by evidence of the thefts themselves, we can not, by inference, also extend the conspiracy to later criminal acts as to the accused, absent any evidence that he participated in planning or executing the acts, derived benefit therefrom, or even knew of them." The allegations of the thefts of 8 and 11 November were stricken from the conspiracy specification.

D. Parties.

1. All parties need not be subject to the UCMJ. United States v. Rhodes, 28 C.M.R. 427 (A.B.R. 1959), aff'd, 29 C.M.R. 551 (C.M.A. 1960) (conviction for conspiracy with Russian to violate United States espionage laws affirmed).

2. Acquittal of co-conspirators.

a. United States v. Espinosa-Cerpa, 630 F.2d 328 (5th Cir. 1980). Accused was charged with conspiring with three named and several unnamed co-conspirators to import marijuana. Initially the court found that no proof was presented that anyone other than the named conspirators were part of the conspiracy. Accordingly, the court analyzed the case "as if the named alleged conspirators were the only ones with whom appellant might have conspired". The named co-conspirators were tried first and acquitted. The accused was then tried for conspiracy and convicted. Conviction affirmed.

"The apparent basis for the traditional rule is the notion that the acquittal of all but one potential conspirator negates the possibility of an agreement between the sole remaining defendant and one of those acquitted of the conspiracy and thereby denies, by definition, the existence of any conspiracy at all. . . . [H]owever, we have some difficulty with [this] notion. . . . The notion that the acquittal of one's alleged coconspirators [sic] concludes the fact of their noncomplicity misapprehends the true nature of an acquittal in the scheme of trial by jury. . . . [A]n acquittal is not to be taken as the equivalent of a finding of the fact of innocence; nor does it necessarily even reflect a failure of proof on the part of the prosecution. Thus, contrary to the notion underlying the rule in question, a jury's acquittal of some co-conspirators should not be taken to negate the fact of their

possible criminal complicity with any remaining alleged co-conspirators. . . . Thus, there is serious question as to the logical foundation for the continued application of the basic rule upon which appellant relies and which he seeks here to extend.

While we are not at liberty in this case to rule upon the continued vitality of that tenet in its original form, we certainly are not disposed to extend its scope to overturn an otherwise valid conviction rendered in a proceeding subsequent to that in which appellant's alleged conspirators were acquitted. In addition to the criticisms that may be leveled at the rule itself, such an extension would also ignore the fact that different evidence might have been presented in the two proceedings or that the two juries might quite reasonably have taken different views of the same evidence. Finally, the rule that appellant seeks to invoke would be blatantly inconsistent with the Supreme Court's decision in Standefer [, 447 U.S. 10 (1980)]. Whether or not labeled as nonmutual collateral estoppel, it would operate in an almost identical manner, barring relitigation of the fact of the other crewmen's having engaged in a conspiracy with appellant solely on the basis of their prior acquittal of that charge. Consequently, we hold that the prior acquittal of appellant's named alleged co-conspirators did not preclude his later conviction for having conspired with them." United States v. Espinosa-Cerpa, 630 F.2d 328, 331-33 (5th Cir. 1980).

b. United States v. Garcia, 16 M.J. 52 (C.M.A. 1983). The concept that the conviction of two or more conspirators is necessary to prove that a conspiracy did exist is based on the often incorrect premise that the evidence against all the conspirators was identical. A per se standard for inconsistent verdicts as to several conspirators need not be "slavishly" imposed.

c. Culpability of other party.

(1) Traditional rule. At least two parties must be culpably involved. United States v. LaBossiere, 32 C.M.R. 337 (C.M.A. 1962). (Taylor solicited four individuals to participate in a conspiracy to commit larceny. The four feigned acquiescence and immediately informed their superiors. No conspiracy existed. "[I]t is well settled that there can be no conspiracy when a supposed participant merely feigns acquiescence with another's criminal proposal in order to secure his detection and apprehension by proper authorities."); United States v. Duffy, 47 C.M.R. 658 (A.C.M.R. 1973) (Accused ordered a prisoner killed. Sergeant L shot and killed the prisoner. Accused convicted of conspiracy to commit involuntary manslaughter and involuntary manslaughter. Sergeant L was subsequently tried and acquitted "because . . . he was found to have lacked mental responsibility." Conviction for conspiracy reversed. "When one is alleged to have conspired with but one other person and that other person is

afflicted with a condition that negates mental responsibility at the pertinent time, conviction for conspiracy is sustainable neither by the precedents nor in logic. . . . The logic is simply that conspiracy being a corrupt agreement, an offense joint by nature, guilt of conspiracy must be shared between at least two conspirators as a condition of the existence of guilt of any one conspirator."); United States v. Sproles, 48 C.M.R. 278 (A.C.M.R. 1974) (Harvey was undergoing interrogation by military police investigators. During a break he called the accused and arranged to buy drugs from him. After the arrangements were completed, Harvey hung up the phone and disclosed the terms of the arrangement to the police. Conviction for conspiracy to distribute drugs reversed. "[T]he co-conspirator had no intention of committing an offense which he hatched in the CID office while under interrogation; rather, he was attempting to gain some benefit for himself from the police authorities. Absent a criminal intent on the part of one of only two conspirators, there can be no conspiracy."); see United States v. Church, 29 M.J. 679 (A.F.C.M.R. 1989), aff'd 32 M.J. 70 (C.M.A. 1991)(no conspiracy when sole co-conspirator feigns acquiescence in a criminal venture to secure another's detection and apprehension).

(2) Modification of the rule. Lack of mental responsibility of sole co-conspirator is not a bar to conviction for conspiracy. United States v. Tuck, 28 M.J. 520 (A.C.M.R. 1989); see TJAGSA Practice Note, Army Court of Military Review Finds That You Can Conspire With an Idiot, The Army Lawyer, Jun. 1989, at 39 (discusses Tuck).

E. Overt Act.

1. MCM, 1984, Part IV, para. 5c(4).

a. The overt act must be independent of the agreement to commit the offense; must take place at the time of or after the agreement; must be done by one or more of the conspirators, but not necessarily the accused; and must be done to effectuate the object of the agreement. See United States v. Nagle, 30 M.J. 1229 (A.C.M.R. 1990).

b. The overt act need not itself be criminal, but it must be a manifestation that the agreement is being executed. Although committing the intended offense may constitute the overt act, commission of the object offense is not essential. Any overt act is enough, no matter how preliminary in nature provided it is a manifestation that the agreement is being executed. See United States v. Nagle, 30 M.J. 1229 (A.C.M.R. 1990).

c. An overt act by one conspirator becomes the act of all without any new agreement specifically directed to that act, and each conspirator is equally guilty even though each does not participate in, or have knowledge of, all of the details of the

execution of the conspiracy.

2. Overt act must be alleged.

United States v. McGlothin, 44 C.M.R. 533 (A.C.M.R. 1971). Specification alleged "In that . . . conspire with . . . to commit an offense under the Uniform Code of Military Justice to wit: pandering by receiving valuable consideration, to wit: six (6) dollars, on account of arranging for unnamed trainees to engage in sexual intercourse with prostitutes." The court found that the specification failed "to allege expressly or by necessary implication an overt act in pursuance of the conspiracy, an essential element of the offense denounced by article 81" and was fatally defective.

3. Only one overt act need be alleged. United States v. Reid, 31 C.M.R. 83 (C.M.A. 1961).

4. If more than one overt act is alleged, only one need be proved. United States v. Reid, supra.

5. The alleged overt act must be proved.

a. United States v. Collier, 14 M.J. 377 (C.M.A. 1983) Substitution of proof of an unalleged overt act does not necessarily constitute a fatal variance. Substantial similarity between the facts alleged in the overt act and those proved is all that is required.

b. United States v. Yarborough, 5 C.M.R. 106 (C.M.A. 1952). Accused was charged with conspiring with Marshall to inflict intentional injury upon himself. Overt acts alleged were placing himself in the line of fire and allowing himself to be shot in the foot. Conviction for conspiracy reversed. The evidence did not establish that the accused intentionally placed himself in the line of fire nor did it establish that he allowed himself to be shot. "While the acts of Marshall might have constituted the overt act in the conspiracy . . . the specification was not so drawn. The government was required to prove under each of the specifications concerning Yarborough that he deliberately allowed himself to be shot by Marshall. This burden was not met."

6. Overt act may be an innocent one.

United States v. Choat, 21 C.M.R. 313 (C.M.A. 1956). Accused was convicted of conspiring to commit larceny. Overt act alleged was obtaining of crowbar with which to break and enter a store. Conviction for conspiracy affirmed. "The overt act need not itself be a crime; on the contrary it can be an entirely innocent act. . . . Consequently, there is no requirement that it pass beyond the stage of preparation so as to amount to an attempt to commit the substantive offense. . . . All that is required is

that the overt act be a manifestation that the conspiracy is at work. . . . [I]t is clear that a court-martial could find as a matter of fact that the procurement of a crowbar was a 'manifestation' of the conspiracy alleged."

7. Overt act must be separate from and occur not prior to the formation of the conspiracy.

a. United States v. Farkas, 21 M.J. 458 (C.M.A. 1986). Act done prior to agreement is not a sufficient overt act.

b. United States v. Kauffman, 34 C.M.R. 63 (C.M.A. 1963). Accused was charged with conspiring with East German secret police to communicate to them national defense information of the United States. Two overt acts were alleged: (1) The accused received the name and address of Klara Weiss as his contact; and (2) A report of all contacts with the accused was prepared and forwarded to East German authorities. Conviction for conspiracy was reversed. Although the government argued that the receipt of the name and address of the contact was an overt act separate from the agreement, the evidence did not support this contention. It was thus insufficient to constitute an overt act in furtherance of the agreement. The second alleged overt act did nothing to effect the object of the conspiracy.

c. United States v. Schwab, 27 M.J. 359 (C.M.A. 1988). Accused's conversations with his alleged co-conspirator, his statement that he put money aside, and notes and sketches did not satisfy the overt act requirement for conspiracy.

8. The overt act may be performed by any member of the conspiracy.

United States v. Yarborough, 5 C.M.R. 106 (C.M.A. 1962). Conspiracy to intentionally injure the accused. Alleged overt acts were those of the accused. Accused did not commit the overt acts alleged, and the government could have, but failed, to allege the overt acts committed by the co-conspirator; see United States v. Nagle, 30 M.J. 1229 (A.C.M.R. 1990).

9. Overt act in drug cases.

a. Overt act for conspiracy to distribute illegal drugs can be the distribution of the drug among co-conspirators. United States v. Tuero, 26 M.J. 106 (C.M.A. 1988).

b. Pooling money to purchase drug is a sufficient overt act for conspiracy to distribute drug. United States v. Figueroa, 28 M.J. 570 (N.M.C.M.R. 1989).

F. **Wharton's Rule.**

1. Some offenses require two or more culpable actors acting in concert. There can be no conspiracy where the agreement exists only between the persons necessary to commit such an offense. Examples include dueling, bigamy, incest, adultery, bribery. MCM, 1984, Part IV, para. 5c(c).

2. a. United States v. McClelland, 49 C.M.R. 557 (A.C.M.R. 1974). Accused was convicted of conspiracy to transfer marijuana and hashish. Defense claimed Wharton's rule prohibited conviction for conspiracy because transfer is an offense which can only be accomplished by two persons. Conviction reversed.

"We submit that Wharton had a valid reason for stating such a rule. . . . Conspiracies are made punishable because of the increased danger involved in group offenses. . . . The unlawful combination is socially harmful because of the added danger and is punished for that reason. . . . However, some unlawful combinations do not have any element of added danger. If the substantive offense requires concerted action of two persons and none participate other than the necessary parties, there is no added danger because nothing additional is involved which is not required to be present in the substantive offense denounced by the statute. In such a case there is no logical basis for conviction of other than the substantive offense if the plan is carried that far, and if not--an attempt to commit the offense, if the plan goes that far."

"The Wharton Rule is accepted by the military. . . . [I]f Wharton's Rule is applicable, it is immaterial whether the intended offense was completed. Completion of the intended offense has no bearing on the issue for there never was a conspiracy."

"We find that conspiracy may not be charged under the facts of the instant case where: (1) a minimum of two parties is required to reach agreement to exchange illegal drugs, and (2) the agreement is an essential element of the exchange, and (3) the purported conspiracy does not have any additional element of proof not found in the completed substantive offense of transfer of marihuana."

b. United States v. Osthoff, 8 M.J. 629 (A.C.M.R. 1979). Accused was convicted inter alia of conspiracy to possess and transfer marijuana and of transfer and possession of marijuana. The conviction was affirmed. Wharton's rule "is merely an aid to statutory construction." Concerted activity in drug transactions is different from offenses such as adultery and dueling. "Agreements that accompany unlawful transfers of drugs tend to pose the kind of threats to society that the law of conspiracy seeks to prevent. Under the circumstances, we cannot ascribe to Congress an intent to limit prosecution to the substantive offense."

c. United States v. Viser, 27 M.J. 562 (A.C.M.R. 1988). Wharton's Rule does not apply to drug offenses.

3. Iannelli v. United States, 420 U.S. 770 (1975). Accused was convicted of conspiracy to violate and violating 18 U.S.C. § 1955, a federal gambling statute making it a crime for five or more persons to operate a prohibited gambling business. Conviction for both offenses was affirmed. Wharton's Rule "has current vitality only as a judicial presumption, to be applied in the absence of legislative intent to the contrary. The classic Wharton's Rule offenses--adultery, incest, bigamy, dueling--are crimes that are characterized by the general congruence of the agreement and the completed substantive offense. The parties to the agreement are the only persons who participate in commission of the substantive offense, and the immediate consequences of the crime rest on the parties themselves rather than society at large. . . . [T]he agreement that attends the substantive offense does not appear likely to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert. It cannot, for example, readily be assumed that an agreement to commit an offense of this nature will produce agreements to engage in a more general pattern of criminal conduct."

"Wharton's Rule applies only to offenses that require concerted criminal activity, a plurality of criminal agents. In such cases, a closer relationship exists between the conspiracy and the substantive offense because both require collective criminal activity. The substantive offense therefore presents some of the same threats that the law of conspiracy normally is thought to guard against, and it cannot automatically be assumed that the legislature intended the conspiracy and the substantive offense to remain as discrete crimes upon consummation of the latter. Thus absent legislative intent to the contrary, the Rule supports a presumption that the two merge when the substantive offense is proved."

"[In this case] we think it evident that Congress intended to retain each offense as an independent curb available for use in the strategy against organized crime."

4. United States v. Wood, 7 M.J. 885 (A.F.C.M.R. 1979). Accused was convicted of conspiracy to violate an anti-black marketing regulation and of violating the regulation. The conviction was affirmed. "The conduct proscribed by the regulation controlling black marketing is very different from the offenses to which the Rule has been traditionally applied. The regulation may be violated by one person. Moreover, Congress intended that the acts alleged be separately charged and punished. The first offense connotes an agreement to do that which is lawfully prohibited--black marketing--and the second is a violation of a regulation which amounts to a thwarting of military discipline. Under the circumstances here, Wharton's Rule does not apply."

5. United States v. Crocker, 18 M.J. 33 (C.M.A. 1984). Wharton's Rule does not apply where more persons are involved or where the concerted activity goes beyond that required for a simple transfer of drugs. Not every "routine" transfer of drugs should, in the court's opinion, lead to the preferral of a charge of conspiracy.

G. Termination.

1. A conspiracy terminates when the object of the conspiracy is attained or all the members withdraw or the members abandon the conspiracy.

2. United States v. Hooper, 4 M.J. 830 (A.F.C.M.R. 1978). Accused was charged with conspiring to violate and violating an Air Force regulation proscribing demonstrations in foreign countries by burning a cross. After the cross was burned, the accused and others returned to the billets. At the billets an alleged co-conspirator stated that the accused "lit the fire." Conviction for violation of the regulation reversed. The statement of the co-conspirator was admissible only if it was made during and in pursuance of the conspiracy. "It is well settled that a conspiracy ends when the objectives thereof are accomplished, if not earlier by abandonment of the aims or when any of the members of the joint enterprise withdraw therefrom." The object of the conspiracy was the erection and burning of the cross. When that was accomplished the conspiracy terminated.

H. Withdrawal.

1. An effective withdrawal or abandonment must consist of affirmative conduct which is wholly inconsistent with adherence to the unlawful agreement and which shows that the party has severed all connection with the conspiracy. A conspirator who effectively abandons or withdraws from the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the abandonment or withdrawal, but he is not liable for offenses committed by the remaining conspirators after his abandonment or withdrawal.

2. An individual may not be convicted of conspiracy if he effectively withdraws before the alleged overt act is committed. MCM, 1984, Part IV, para. 5c(6).

3. Withdrawal may be achieved by acts.

United States v. Miasel, 24 C.M.R. 184 (C.M.A. 1957). Accused and several others agreed to commit sodomy upon a fellow soldier. The group forced the victim to lie down while the accused climbed on top of the victim. The accused did not commit sodomy nor did he attempt to do so. Eventually the group took the

victim out of the room and committed forcible sodomy upon him. The accused did not leave the room with the group and had no further participation in the venture. The Board of Review found "that the accused had fully terminated his participation in the group's conduct before a portion of the group had left the barracks with the victim, after which the various acts of sodomy were committed. The failure of the accused to accompany the group when they left the barracks is indicative of an affirmative act on his part to effect a withdrawal and constitutes conduct wholly inconsistent with the theory of continuing adherence."

4. Withdrawal requires an affirmative act sufficient to evidence an intent to disassociate oneself with the crime; mere passive non-involvement in the final executing stages of the crime is insufficient. United States v. Murphy, CM 435280 (A.C.M.R. 19 Oct 78) (unpub.).

5. United States v. Rhodes, 28 C.M.R. 427 (A.B.R. 1959), aff'd, 29 C.M.R. 551 (C.M.A. 1960). During 1951-1953 the accused, while stationed at the United States embassy in Moscow, agreed to supply information to Russian agents. In 1953 he returned to the United States and did not again actively participate in the conspiracy. In 1957 a co-conspirator committed an overt act. Conspiracy conviction affirmed. "[I]t is no defense to the charge of conspiracy that appellant was inactive [in the conspiracy] subsequent to June 1953. So long as acts in furtherance thereof were committed by his co-conspirators, he, like any other member of the conspiracy, is responsible for acts of his associates until he withdraws from the criminal combination, and this without regard to his knowledge of the commission of such acts or his agreement to join therein. . . . Since appellant was in fact a member of a conspiracy of the described nature in June 1953, and since he took no affirmative action to withdraw therefrom, he continued to remain a member thereof and was so associated in February 1957."

6. "A conspiracy once established is presumed to continue until the contrary is established. . . . A withdrawal from a conspiracy is effective only at such time as the accused abandons the design and communicates the fact of his abandonment to his co-conspirators." United States v. Graalum, 19 C.M.R. 667 (A.F.B.R. 1955).

I. Evidentiary Rules.

1. "A statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." M.R.E. 801(d)(2)(E).

2. In a conspiracy to violate a regulation, the statement of one co-conspirator to another which identified the accused as the active perpetrator was inadmissible because (1) the conspiracy had terminated because its object had been attained, and (2) the utterance did not "further" nor was it in pursuance of the conspiracy. United States v. Hooper, 4 M.J. 830 (A.F.C.M.R. 1978).

Hearsay declarations of co-conspirators cannot be received into evidence under the co-conspirator exception of M.R.E. 801(d)(2)(E) unless the declarations were made in furtherance of the conspiracy. United States v. Weiner, 578 F.2d 757, 768 (9th Cir. 1978). Not all statements made by co-conspirators can be considered to have been made in furtherance of the conspiracy. Fiswick v. United States, 329 U.S. 211, 217 (1946) ("confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise"). "Mere conversation between conspirators" or "merely narrative declarations" are not admissible as declarations in furtherance of the conspiracy. United States v. James, 510 F.2d 546, 549 (5th Cir. 1975); United States v. Birnbaum, 337 F.2d 490, 495 (2d Cir. 1964); United States v. Goodman, 129 F.2d 1009, 1013 (2d Cir. 1942). For declarations to be admissible under the co-conspirator exception, they must further the common objectives of the conspiracy. United States v. Eubanks, 591 F.2d 513 (9th Cir. 1979). A co-conspirator's statement is not admissible when the conspiracy to rob the victim ended upon apprehension of the accused and his co-accuseds; the government must prove subsequent conspiracy to obstruct justice. United States v. Garrett, 16 M.J. 941 (N.M.C.M.R. 1983).

3. A post-conspiracy confession is admissible only against the declarant. United States v. Beverly, 34 C.M.R. 248 (C.M.A. 1964).

4. Acts committed by two conspirators after the object of the conspiracy is attained may be admissible in evidence against a third conspirator to prove the existence of a conspiracy. United States v. Salisbury, 33 C.M.R. 383 (C.M.A. 1963).

5. When the statement of a co-conspirator is offered in evidence against the accused, the questions of whether a conspiracy existed and whether the statement was made in the course of and in furtherance of the conspiracy are to be determined solely by the judge as preliminary questions under M.R.E. 104(a). This is the case even though "the preliminary question - the existence of a conspiracy and the defendant's participation in it - may also coincide with an ultimate question of fact for the jury if a conspiracy is charged in the indictment." United States v. Enright, 579 F.2d 980, 985 (6th Cir. 1978).

6. The test for admissibility is preponderance of the evidence. United States v. Enright, 579 F.2d 980 (6th Cir. 1978); United States v. Bell, 573 F.2d 1040 (8th Cir. 1978); United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977).

7. A statement of one co-conspirator is admissible against another if:

a. a conspiracy exists;

b. the declarant and the accused were members of the conspiracy when the statement was made; and

c. the statement was made in the course of and in furtherance of the conspiracy. United States v. Enright, 579 F.2d 980 (6th Cir. 1978); United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977).

8. A statement of a co-conspirator is admissible under M.R.E. 801(d)(2)(E) even though conspiracy is not charged. United States v. Lutz, 621 F.2d 940 (9th Cir. 1980); United States v. Enright, 579 F.2d 980 (6th Cir. 1978); United States v. Knudson, 14 M.J. 13 (C.M.A. 1982).

9. The trial judge may require the government to establish the existence of a conspiracy prior to admitting the declarant's statement into evidence, or he may permit the government to offer the statement first and then prove the existence of a conspiracy. United States v. Vinson, 606 F.2d 149 (6th Cir. 1979). "In United States v. McCormick, 565 F.2d 286, 289 (4th Cir. 1977), cert. denied, 434 U.S. 1021 (1978), this court stated the controlling principle: '[T]here must be independent evidence of [the accused's] participation in and the conspiracy itself to permit admission into evidence against him of declarations made by co-conspirators.' Independent evidence is evidence other than the alleged co-conspirator statements themselves. 'Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence.' Glasser v. United States, 315 U.S. 60, 74-75 (1942); see also United States v. Stroupe, 538 F.2d 1063, 1065 (4th Cir. 1976). Although the independent evidence need not establish the participation of the defendant in the conspiracy beyond a reasonable doubt, United States v. Jones, 542 F.2d 186, cert. denied, 426 U.S. 922 (1976), it must be sufficient at least to take the question to the jury. United States v. Stroupe, supra at 1065. Absent such independent evidence, the proffered statements are inadmissible hearsay." United States v. Gresko, 632 F.2d 1128, 1131 (4th Cir. 1980). More recently, however, the Supreme Court has held that independent evidence of a conspiracy is not required to admit a co-conspirator's statements against the accused; in other words, bootstrapping is allowed. Bourjaily v. United States, 107 S.Ct.

268 (1988). Also, the prosecution need not show unavailability of the nontestifying co-conspirator. United States v. Inadi, 106 S.Ct. 1121 (1986) (statements admissible because taped conversations were reliable).

J. Punishment.

1. Conspiracy and the substantive offense which is the object of the conspiracy are separately punishable. United States v. Washington, 1 M.J. 473 (C.M.A. 1976); United States v. Nagle, 30 M.J. 1229 (A.C.M.R. 1990); United States v. Dickson, 49 C.M.R. 614 (A.C.M.R. 1974). The reason for consistently holding that a conspiracy is separately punishable from the substantive crime is the increased danger concentrated in a confederation of law violators. As the Supreme Court said in Callanan v. United States, 364 U.S. 587, 593-94 (1961):

This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement--partnership in crime--presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from the path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed.
Hence, the formation of conspiratorial groups is deemed socially harmful because of the added danger and, thus, is made specifically punishable for this reason. That rationale remains persuasive to the courts. See also Iannelli v. United States, 420 U.S. 770 (1975).

2. Pinkerton v. United States, 328 U.S. 640 (1946). Accused charged with ten substantive counts and one conspiracy count. "A single conspiracy was charged and proved. Some of the overt acts charged in the conspiracy count were the same acts charged in the substantive counts. . . . [I]t is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses. . . . If the overt act be the offense which was the object of the conspiracy and is also punished, there is not a double punishment of it. The agreement to do an unlawful act is even then distinct from the doing of the act." See also United States v. Dunbar, 12 M.J. 218 (C.M.A. 1982).

3. A conspirator may be convicted for substantive offenses committed by another conspirator, provided such offenses were committed while the agreement continued to exist and were in furtherance of the agreement. United States v. Gaeta, 14 M.J. 383 (C.M.A. 1983).

4. Solicitation to blackmarket multiplicious with conspiracy to blackmarket, even though conspiracy involved nine soldiers and the solicitation involved seven. United States v. Jaks, 28 M.J. 908 (A.C.M.R. 1989).

5. Conspiracy to commit murder charge was not multiplicious for findings with solicitation to commit murder charge upon the same victim, where the offenses were separated by time, involved different participants, were not lesser included offenses of the other, and were not parts of an indivisible crime. United States v. Herd, 29 M.J. 702 (A.C.M.R. 1989); see United States v. Carter, 30 M.J. 179 (C.M.A. 1990).

6. Conspiracy to commit larceny of government funds and attempted larceny of the same funds were not multiplicious for findings, as each offense required proof of a separate element and the overt acts alleged and proven in each charge were completely different. United States v. Stottlemire, 28 M.J. 477 (C.M.A. 1989).

7. Because the theft of two separate items was contemplated by the conspiracy, their combined value could be used to determine the maximum punishment. United States v. Crawford, 31 M.J. 736 (A.F.C.M.R. 1990).

8. Charges of conspiracy to distribute marijuana and conspiracy to distribute LSD were multiplicious for findings where they were based on one continuous agreement to buy drugs and split the profit. United States v. Grubb, 34 M.J. 532 (A.F.C.M.R. 1991).

III. SOLICITATION. UCMJ art. 82 and art. 134.

A. Introduction.

1. Solicitation is chargeable under either article 82 or article 134, UCMJ, depending on the nature of the crime solicited. If the offense solicited is desertion (art. 85), mutiny (art. 94), misbehavior before the enemy (art. 99), or sedition (art. 94) the solicitation is charged as a violation of article 82, UCMJ. Solicitation to commit offenses other than these four named offenses is charged as a violation of article 134, UCMJ. MCM, 1984, Part IV, para. 6c(3).

B. Elements Of Solicitation Under Article 82, UCMJ.

1. That the accused solicited or advised a certain person or persons to commit any of the four offenses named in article 82; and

2. That the accused did so with the intent that the offense actually be committed;

[Note: If the offense solicited or advised was attempted or committed, add the following element]

3. That the offense solicited or advised was (committed) (attempted) as the proximate result of the solicitation.

C. Elements Of Solicitation Under Article 134, UCMJ.

1. That the accused solicited or advised a certain person or persons to commit a certain offense under the code other than one of the four offenses named in article 82;

2. That the accused did so with the intent that the offense actually be committed; and

3. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

D. Explanation.

1. Instantaneous offense. The offense is complete when a solicitation is made or advice given with the specific wrongful intent to influence another or others to commit an offense. It is not necessary that the person or persons solicited or advised agree to or act upon the solicitation or advice. MCM, 1984, Part IV, para. 6c(1).

2. Form of solicitation. Solicitation may be by means other than word of mouth or writing. Any act or conduct which reasonably may be construed as a serious request or advice to commit an offense. It is not necessary that the accused act alone in the solicitation or in the advising; the accused may act through other persons in committing this offense. MCM, 1984, Part IV, para. 6c(2).

3. A solicitation is a statement that reasonably may be construed as a serious request or advice to commit an offense and done with the specific intent that the solicited offense be committed. United States v. Benton, 7 M.J. 606 (N.C.M.R. 1979).

The rule is to prevent the "harm that would result should the inducement prove successful" and to protect those "aboard military reservations from being exposed to inducement to commit or join in the commission of crimes."

E. Relationship to Other Crimes.

1. Accomplice liability distinguished. If the person solicited actually commits the target crime, the solicitor is clearly an "inciter" and therefore liable as a party to the crime. However, this is **in addition** to his or her liability for the separate crime of solicitation; and the solicitor can be convicted of solicitation even if the subject does not respond to the incitement.

2. Conspiracy distinguished. Unlike conspiracy, solicitation does not require that any agreement be reached. Thus, while conspiracy may follow solicitation (where the person solicited concurs in the criminal scheme), if the subject refuses to enter into a conspiracy, the solicitor is nevertheless liable for the crime of solicitation.

3. Attempt distinguished. Unlike solicitation, attempt requires that the accused have progressed far enough in his or her criminal scheme to have gone beyond mere preparation. Generally, a person who does the bare minimum that suffices for solicitation will not have done enough to be guilty of attempt. But if a person does more than the bare minimum, this may be attempt. Or if the person solicited progresses towards the commission of the crime, that person will be guilty of attempt and the solicitor will, because of his or her incitement, incur liability as a party to that attempt.

F. Pleading Issues.

1. Solicitation is a specific intent crime, whether charged under Article 82 or 134. United States v. Taylor, 23 M.J. 314 (C.M.A. 1987); United States v. Asfeld, 30 M.J. 917 (A.C.M.R. 1990).

2. Misdesignation of Article 134 solicitation charge as Article 82 may properly be amended as a minor change. United States v. Brewster, 32 M.J. 591 (A.C.M.R. 1991).

3. Scope of offense of solicitation is not limited to offenses listed in Article 82 and other solicitations can be prosecuted under Article 134. The courts have never applied the preemption doctrine to prohibit punishment for solicitations under Article 134. United States v. Taylor, 23 M.J. 314 (C.M.A. 1987).

G. Special Considerations.

1. Uncommunicated solicitation. A solicitation is still criminal even if the defendant fails to effectively communicate it to his intended subject (as where an intermediary fails to pass on the message). The theory is that by engaging in the proscribed act with the requisite intent, the solicitor has manifested his dangerousness and should not escape punishment because of a fortuitous event. [Model Penal Code §5.02, comment (Tent. Draft No. 10, 1960)].

2. Renunciation. It is not clear whether a solicitor may escape liability by demonstrating that he later renounced his intention. The matter appears not to have been resolved definitively by the courts; and although the Model Penal Code would recognize such a defense, the accused must show that he persuaded the subject not to commit the crime under circumstances manifesting a "complete and voluntary" abandonment of the criminal purpose. [Model Penal Code §5.02(3)].

CHAPTER 3

MILITARY OFFENSES

ABSENCE FROM DUTY AND RELATED OFFENSES

I. ABSENCE WITHOUT AUTHORITY.

A. Introduction.

1. Scope. Absence without authority as used in this chapter refers to offenses under three articles of the Uniform Code of Military Justice:

a. Article 85 - Desertion and attempted desertion.

b. Article 86 - Failure to go to appointed place of duty, leaving appointed place of duty, and absence without leave.

c. Article 87 - Missing movement.

B. Charges. Offenses sounding in unauthorized absence are punishable only under UCMJ articles 85, 86 and 87 and not under articles 133 and 134. United States v. Deller, 12 C.M.R. 165 (C.M.A. 1953); United States v. Hale, 42 C.M.R. 342 (C.M.A. 1970); but see United States v. Clark, 15 M.J. 594 (A.C.M.R. 1983).

C. Maximum Punishments. MCM, 1984, Part IV, paragraphs 9e, 10e, and 11e set forth the limits on imposable sentences for unauthorized absence violations. Note the enhanced punishment available for desertion in time of war in MCM, 1984, Part IV, para. 9e(3).

II. DESERTION. UCMJ art. 85.

A. Types of Desertion. The offense of desertion exists when any member of the armed forces:

1. Without authority goes or remains absent from his or her unit, organization or place of duty, with intent to remain away therefrom permanently. United States v. Horner, 32 M.J. 576 (C.G.C.M.R. 1991); United States v. Centeno, 17 M.J. 642 (N.M.C.M.R. 1984); or

2. Quits his or her unit, organization or place of duty with intent to avoid hazardous duty or to shirk important service. United States v. Hocker, 32 M.J. 594 (A.C.M.R. 1991); or

3. Without being separated from one of the armed forces, enlists or accepts an appointment in another of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States.

4. Additionally, a commissioned officer is in desertion if, after tender of a resignation and before its acceptance, he quits his post or proper duties without leave and with intent to remain away therefrom permanently.

B. Elements of Desertion With Intent to Remain Away Permanently (The most common form of desertion.). MCM, 1984, Part IV, para. 9b(1).

1. At a certain time and place the accused absented himself from his unit, organization or place of duty;

2. The accused remained so absent until a certain time;

3. His absence was without proper authority from anyone competent to give leave; and,

4. The accused intended at the time of the absence or at some time during the absence to remain away permanently from his unit, organization or place of duty. The totality of circumstances surrounding the offense can negate this element. United States v. Logan, 18 M.J. 606 (A.F.C.M.R. 1984).

C. Less Common Forms of Desertion.

1. Elements. The elements are found in MCM, 1984, Part IV, paras. 9b(2), (3).

2. Important service.

a. Prospective duty as a medic at Fort Sam Houston during Persian Gulf War qualified as important service. United States v. Swanholm, 36 M.J. 743 (A.C.M.R. 1992).

b. Thirty-day sentence to brig not important service for purposes of desertion. United States v. Wolff, 25 M.J. 752 (N.M.C.M.R. 1987). Likewise, being an accused at a special court-martial is not important service. United States v. Walker, 26 M.J. 886 (A.F.C.M.R. 1988); see TJAGSA Practice Note, Being an Accused: "Service," But Not "Important Service," The Army Lawyer, Apr. 1989, at 55 (discusses Walker).

D. Desertion Terminated by Apprehension.

1. In addition to the four elements of desertion listed above, if the accused's absence was terminated by apprehension, the

Government may allege the additional element of termination by apprehension.

2. If alleged in the specification, covered by instructions and proved beyond a reasonable doubt, termination by apprehension increases the maximum punishment for the offense from a "DD and 2 years" to a "DD and 3 years." MCM, 1984, Part IV, para. 9e(2)(a); United States v. Nicaboine, 11 C.M.R. 152 (C.M.A. 1953).

3. The optional element of termination by apprehension applies to all forms of desertion except absence with intent to avoid hazardous duty or to shirk important service, as the maximum punishment for this latter most serious form of desertion is already a "DD and 5 years." MCM, 1984, Part IV, para. 9e(1).

4. An accused may be convicted of desertion terminated by apprehension even though he was apprehended by civilian authorities for a civilian offense and thereafter notified the civilian authorities of his AWOL status. United States v. Fields, 32 C.M.R. 193 (C.M.A. 1962); United States v. Babb, 19 C.M.R. 317 (C.M.A. 1955). Such apprehension does not necessarily prove, however, that the accused was returned to military control for purposes of terminating desertion by apprehension. United States v. Washington, 24 M.J. 527 (A.F.C.M.R. 1987).

E. Termination Generally.

Desertion did not terminate when military authorities requested civilian authorities deny a deserter bail until resolution of civilian charges. United States v. Asbury, 28 M.J. 593 (N.M.C.M.R. 1989).

F. Attempted Desertion.

1. Attempted desertion, unlike most offenses, is chargeable under UCMJ art. 85 as well as under UCMJ art. 80 (attempts). MCM, 1984, Part IV, para. 9c(3).

2. Attempted desertion should be charged under UCMJ art. 85 rather than under UCMJ art. 80. MCM, 1984, Part IV, para. 4c(5)(a).

G. Intent in Desertion Cases.

The offenses of desertion and absence without leave are similar in most respects--except for the element of intent involved in desertion. That unique element is discussed immediately below. See United States v. Horner, 32 M.J. 576 (C.G.C.M.R. 1991). The other elements of desertion are the same as the elements of AWOL and are discussed infra, section III.

1. Evidence of intent may be based upon all the facts and circumstances of the case. Length of absence, actions and statements of the accused, and the method of termination of the absence (apprehension or voluntary surrender) are some factors to be considered. MCM, 1984, Part IV, para. 9c(1)(c)(iii).

2. The length of the absence alone is insufficient to establish an intent to desert; however, in combination with other circumstantial evidence, it may be sufficient. United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

3. Evidence of a 26-month absence while accused was on orders for a war zone and where he was apprehended a long distance from his unit was sufficient to establish intent to desert. United States v. Mackey, 46 C.M.R. 754 (N.C.M.R. 1972).

4. Evidence of a two-year absence in vicinity of assigned unit and evidence of termination by apprehension and of previous absences, despite retention of an identification card, was sufficient to show an intent to desert. United States v. Balagtas, 48 C.M.R. 339 (N.C.M.R. 1972).

5. The intent to remain away permanently need not coincide with the accused's departure. A person must have had, either at the inception of the absence or at some time during the absence, the intent to remain away permanently. MCM, 1984, Part IV, para. 9c(1)(c)(i).

6. In a case where desertion with intent to shirk important service was charged, infantry service in Vietnam was held to be "important service." United States v. Moss, 44 C.M.R. 298 (A.C.M.R. 1971). See also United States v, Hocker, 32 M.J. 594 (A.C.M.R. 1991)(accused's plea provident to desertion with intent to avoid hazardous duty where service was duty in Persian Gulf)

7. Desertion is a specific intent crime. United States v. Holder, 22 C.M.R. 3 (C.M.A. 1956). Intent, therefore, must be proved beyond a reasonable doubt at trial.

8. In view of the three types of intent encompassed in UCMJ art. 85 (i.e., intent to remain away permanently, intent to avoid hazardous duty, intent to shirk important service), the crime of desertion is not alleged unless the specific form of intent is stated in the specification. United States v. Morgan, 44 C.M.R. 898 (A.C.M.R. 1971).

9. Failure to prove the element of intent is not necessarily fatal to the government's case because AWOL under UCMJ art. 86 is a lesser included offense of most forms of desertion. MCM, 1984, Part IV, para. 9d.

10. "Desert" and "desertion" are terms of art which necessarily and implicitly include the requirement that the absence was without authority. Therefore, a specification which alleges that the service member "did desert" is the equivalent of alleging that the members did "without authority and with the intent to remain away permanently absent himself from his unit." United States v. Lee, 19 M.J. 587 (N.M.C.M.R. 1984).

III. **ABSENCE WITHOUT LEAVE.** UCMJ art. 86.

A. **Failure to Go to Appointed Place of Duty** (failure to repair). UCMJ art. 86(1).

1. The elements of the offense are:

a. A certain authority appointed a certain time and place of duty for the accused;

b. The accused knew or had reasonable cause to know that he was required to be present at the appointed time and place of duty; and,

c. The accused without proper authority failed to go to the appointed place of duty at the time prescribed.

2. The "appointed place of duty" involved in UCMJ art. 86(1) refers to a specifically appointed place of duty rather than a general place of duty. A specification which lists only the accused's unit or sub-unit thereof does not list a specific place of duty and is fatally defective. United States v. Sturkey, 50 C.M.R. 110 (A.C.M.R. 1975).

3. The notification of intent to impose nonjudicial punishment need not describe the "appointed place of duty" with the same specificity as a specification used in a courtmartial. United States v. Atchison, 13 M.J. 798 (A.C.M.R. 1982).

4. A place and time of duty are not "appointed" unless the accused has actual knowledge of the order purporting to appoint such place and time of duty. MCM, 1984, Part IV, para. 10c(2). But see, United States v. Gilbert, 23 C.M.R. 914 (A.F.B.R. 1957) (place and time of duty are not appointed unless the accused has actual or constructive knowledge of the order purporting to appoint such time and place of duty).

5. Lesser included offenses.

a. UCMJ art. 86(1) is not a lesser included offense of UCMJ art. 86(3). United States v. Reese, 7 C.M.R. 292 (A.B.R. 1953).

b. UCMJ art. 86(3) is not a lesser included offense of UCMJ art. 86(1) or (2). United States v. Sturkey, 50 C.M.R. 110 (A.C.M.R. 1975).

6. Ordinarily, violation of an order to report to a particular place under UCMJ art. 92 constitutes nothing more than a failure to repair. The maximum punishment is therefore limited to that for failure to repair. United States v. Baldwin, 49 C.M.R. 814 (A.C.M.R. 1975); MCM, 1984, Part IV, para. 14c(2)(b). If, however, the order to return to duty was issued in performance of a proper military function and not for the purpose of increasing the punishment, the accused may be convicted and punished for both offenses. United States v. Petersen, 17 M.J. 69 (C.M.A. 1983).

B. Leaving Place of Duty. UCMJ art. 86(2).

1. The elements of the offense are:

a. A certain authority appointed a certain time and place of duty for the accused;

b. The accused knew or had reasonable cause to know that he was required to be present at the appointed time and place of duty;

c. The accused without proper authority went from the appointed place of duty after having reported to that place.

2. The appointed place of duty must be specific and not general. A specification listing only a general place of duty is fatally defective. United States v. Sturkey, 50 C.M.R. 110 (A.C.M.R. 1975). The "appointed place" need not be alleged with as much specificity in non-judicial proceedings. United States v. Atchison, 13 M.J. 798 (A.C.M.R. 1982).

3. An absence from unit, organization or place of duty under UCMJ art. 86(3) is not a lesser included offense of going from appointed place of duty under UCMJ art. 86(2). United States v. Sturkey, 50 C.M.R. 110 (A.C.M.R. 1978).

C. Absence Without Leave. UCMJ art. 86(3); see generally, Anderson, Unauthorized Absences, The Army Lawyer, Jun. 1989, at 3.

1. Several offenses are included under UCMJ art. 86(3):

a. Absence without leave ("standard" AWOL).

b. AWOL from guard, watch or duty section.

c. AWOL from guard, watch or duty section with intent to abandon same.

d. AWOL with intent to avoid maneuvers or a field exercise.

2. The several lesser known offenses under UCMJ art. 86(3) listed in paras. 1b, c, and d, above, are aggravated forms of AWOL permitting increased punishment. MCM, 1984, Part IV, para. 10e(3), (4), and (5). Note that two of the hybrids do contain an intent element. For the elements and a discussion of the hybrid forms of AWOL, see MCM, 1984, Part IV, para. 10c.

3. Unless otherwise indicated, the discussion of AWOL in this section refers to the standard form of AWOL.

4. The elements of "standard" AWOL are:

a. The accused, at a certain time and place alleged, absented himself from the unit, organization or place of duty at which he was required to be;

b. The absence was without proper authority from anyone competent to give leave;

c. The accused remained absent until some later date and/or time.

5. Definition of terms.

a. "Unit" refers to a military element such as a company or battery.

b. "Organization" refers to a larger command consisting of two or more units. In one case, the United States Air Force was held to be an organization. Query, how would you prove a person absent from this vast worldwide organization? See United States v. Brown, 24 C.M.R. 585 (A.F.B.R. 1957); United States v. Vidal, 45 C.M.R. 540 (A.C.M.R. 1972).

c. "Place of duty at which the accused was required to be" is a generic term designed to cover the broader concepts of general place of duty such as command, quarters, station, base, camp or post. United States v. Brown, 24 C.M.R. 585 (A.F.B.R. 1957). Note that this definition is different from "a place of duty" under UCMJ art. 86(1) and 86(2), which refers to a specific "appointed place of duty.".

d. An individual may be absent from more than one unit. United States v. Mitchell, 22 C.M.R. 28 (C.M.A. 1956); United States v. Green, 14 M.J. 766 (A.C.M.R. 1982).

6. A specification which alleges the wrong unit requires dismissal. United States v. Walls, 1 M.J. 734 (A.F.C.M.R. 1975); United States v. Riley, 1 M.J. 639 (C.G.C.M.R. 1975); United

States v. Holmes, 43 C.M.R. 446 (A.C.M.R. 1970).

7. The specification under UCMJ art. 86(3) must allege the accused was absent from (his) unit, organization or other place of duty at which he was required to be. Also, alleging a place of duty without alleging that the accused was required to be there is fatal. United States v. Kohlman, 21 C.M.R. 793 (A.B.R. 1956). Absence from a unit cannot be supported when the member is in fact present, albeit casually. United States v. Wargo, 11 M.J. 501 (N.C.M.R. 1981).

8. The specification must allege that the absence was "without authority." Failure to include "without authority" is a fatal defect. United States v. Fout, 13 C.M.R. 121 (C.M.A. 1953); United States v. Torrence, 42 C.M.R. 892 (A.C.M.R. 1970); but see United States v. Watkins, 21 M.J. 208 (C.M.A. 1986) (omission not fatal when first challenged on appeal, accused pled guilty, and no prejudice evident).

9. Mere failure to follow unit checkout procedure to one granted leave does not constitute AWOL. United States v. Dukes, 30 M.J. 793 (N.M.C.M.R. 1990).

10. Duration of the absence.

a. An unauthorized absence is complete the moment the accused leaves the unit without authority. It is not a continuing offense. United States v. Jackson, 20 M.J. 83 (C.M.A. 1985); United States v. Lynch, 47 C.M.R. 498 (C.M.A. 1973); United States v. Kimbrell, 28 M.J. 542 (A.F.C.M.R. 1989); see United States v. Newton, 11 M.J. 580 (N.C.M.R. 1980) (accused's plea was improvident when the accused admitted that his absence actually began before the date alleged in the specification which constituted an admission to an uncharged offense); but see United States v. Brock, 13 M.J. 766 (A.F.C.M.R. 1982) (plea to "13 October" not improvident as it was embraced by "on or about" 14 October specification).

b. The duration of an absence must be proved in order to determine the legal punishment for the offense. United States v. Lynch, supra; see also United States v. Simmons, 3 M.J. 398 (C.M.A. 1977).

c. The duration of an absence alleged in a specification may be decreased but not enlarged by the court. United States v. Turner, 23 C.M.R. 674 (C.G.B.R. 1957), aff'd (not discussing this issue), 25 C.M.R. 386 (C.M.A. 1958).

d. An accused may be found guilty of two or more separate unauthorized absences under one specification, but the maximum punishment may not increase. MCM, 1984, Part IV, para. 10c(11); see United States v. Fritz, 31 M.J. 661 (N.M.C.M.R. 1990);

see generally TJAGSA Practice Note, Fragmenting One AWOL into Many, The Army Lawyer, Mar. 1991, at 41 (discusses Fritz).

e. A specification may not be amended to increase punishment. United States v. Krutzinger, 35 C.M.R. 207 (C.M.A. 1965).

f. A seven-day AWOL is not a "minor" offense for purposes of joinder of major and minor offenses. United States v. Woods, 4 M.J. 807 (A.F.C.M.R. 1978).

g. Term of AWOL was not interrupted by authorized leave which was scheduled to begin after AWOL commenced. United States v. Kimbrell, 28 M.J. 542 (A.F.C.M.R. 1980); United States v. Ringer, 14 M.J. 979 (N.M.C.M.R. 1982).

h. Absence without leave can occur even though civil incarceration which prevents accused from returning to military control did not result in a conviction for misconduct. United States v. Sprague, 25 M.J. 743 (A.C.M.R. 1987).

i. Military judge cannot alter inception date of AWOL to within two years of receipt of charges by the summary court-martial convening authority so as to defeat the running of the statute of limitations. United States v. Jones, 26 M.J. 650 (A.C.M.R. 1988).

11. Ending date of the absence.

a. Methods of return to military control.

(1) Surrender to military authorities. If a person presents himself to military authorities and notifies them of his AWOL status, such authority is bound to exercise control over him. The surrender terminates the AWOL. United States v. Kitchen, 18 C.M.R. 165 (C.M.A. 1955); but see United States v. Dubry, 12 M.J. 36 (C.M.A. 1981) (accused's surrender to military authority was incomplete because he was out on civilian bond, the terms of which made the accused unable to return to unrestricted military control).

(2) Apprehension by military authority. Apprehension by military authorities of a known absentee terminates an AWOL. The apprehension need not be by the same service of which the accused is a member. United States v. Coates, 10 C.M.R. 123 (C.M.A. 1953).

(3) Delivery to military authorities. If a known absentee is delivered by anyone to military authority, this terminates the AWOL. Additionally, where a service member is apprehended by civilian authorities for a civilian offense and the authorities indicate a willingness to turn the member over to

military control, the failure or refusal of military officials to take control of the member operates constructively to terminate the absence. United States v. Lanphear, 49 C.M.R. 742 (C.M.A. 1975); but see United States v. Bowman, 49 C.M.R. 406 (A.C.M.R. 1974).

(4) Apprehension by civil authorities at the request of the military. AWOL is terminated upon apprehension of a known absentee by civil authority acting at the request and on behalf of military authorities. United States v. Garner, 23 C.M.R. 42 (C.M.A. 1957); see also United States v. Hart, 47 C.M.R. 686 (A.C.M.R. 1973).

(5) Telephone contact alone will not effect a return to military control. United States v. Anderson, 1 M.J. 688 (N.C.M.R. 1975); see also United States v. Sandell, 9 M.J. 798 (N.C.M.R. 1980) (absentee informed recruiter by telephone he wished to surrender, but before submitting to authority as directed, member became frightened and departed area. HELD: no constructive termination).

b. Requirement of exercise of control with knowledge of absence.

(1) The effective date of return to military control may be accomplished by means other than an actual return to military control. An AWOL may be terminated by the exercise of control over the absentee by military authorities having knowledge of the status or in a position to obtain such knowledge by use of reasonable diligence. United States v. Gudatis, 18 M.J. 816 (A.F.C.M.R. 1984); United States v. Jackson, 2 C.M.R. 96 (C.M.A. 1952).

(2) Military authorities may not refuse to take affirmative steps to control the absentee after an accused has done everything within his power to effect a surrender. United States v. Reeder, 46 C.M.R. 11 (C.M.A. 1972); United States v. Raymo, 1 M.J. 31 (C.M.A. 1975).

c. Mere casual presence at a military installation, unknown to proper authority and for purposes primarily the absentee's own, does not end the unauthorized absence. United States v. Williams, 29 M.J. 504 (A.C.M.R. 1989); United States v. Self, 35 C.M.R. 557 (A.B.R. 1965); see also United States v. Acemoglu, 45 C.M.R. 335 (C.M.A. 1972) (casual presence at an American embassy not enough); United States v. Baughman, 8 M.J. 545 (C.G.C.M.R. 1979). United States v. Coglin, 10 M.J. 670, 672 (A.C.M.R. 1981), lists three factors which must be found to constitute a voluntary termination. These are:

(1) The absentee must present himself to competent military authority with the intention of returning to military duty;

(2) The absentee must identify himself properly and must disclose his status as an absentee; and

(3) The military authority, with full knowledge of the individual's status as an absentee, exercises control over him.

d. If the absentee discloses his military status after being arrested by civilian authorities for civilian offenses in hopes of avoiding a civilian trial and conviction, the termination is not voluntary.

e. Known presence at a military installation will not constitute termination where the absentee, by design and misrepresentation, conceals his identity or duty status. United States v. Self, supra.

f. The soldier must voluntarily submit or offer to submit to military authorities with a bona fide intention to return to duty. United States v. Self, supra. Where an accused thwarted an attempt to exercise control by refusing to submit to lawful order, military control was not established. United States v. Patterson, 14 M.J. 608 (A.F.C.M.R. 1982).

12. Computation of the period of AWOL. MCM, 1984, Part IV, para. 10c(9).

a. A continuous absence of not more than 24 hours is considered one day.

b. A continuous absence of more than 24 hours but not more than 48 hours is considered two days.

c. Hours of departure and return on different dates are assumed to be the same if not alleged.

D. Intent Under Article 86, UCMJ.

1. Specific intent is not an element of the offenses under UCMJ art. 86, and proof of the unauthorized absence alone is sufficient to establish a prima facie case. Note, however, that specific intent is a necessary element in proving certain matters in aggravation (e.g., intent to avoid field maneuvers or field exercises). MCM, 1984, Part IV, paras. 10c(3) and (4).

2. The offense of absence without leave requires only a general intent while desertion requires a specific intent. United States v. Holder, 22 C.M.R. 3 (C.M.A. 1956).

E. Attempts.

Attempted AWOL is a lesser included offense of desertion

and attempted desertion. United States v. Evans, 28 M.J. 753 (A.F.C.M.R. 1989).

F. Multiplicity.

1. AWOL and breach of arrest are multiplicious for sentencing purposes. United States v. Franklin, 31 C.M.R. 63 (C.M.A. 1961).

2. AWOL and disobedience of an order are multiplicious for sentencing purposes. United States v. Granger, 26 C.M.R. 499 (C.M.A. 1958); United States v. Kajander, 31 C.M.R. 479 (C.G.B.R. 1962); see also United States v. Hawks, 15 M.J. 316 (C.M.A. 1983) (summary disposition) (disobedience set aside as multiplicious); contra United States v. Petersen, 17 M.J. 69 (C.M.A. 1983) (where purpose of the order was not to increase punishment).

3. An AWOL which derives from leaving an area in breach of restriction is multiplicious for findings with the offense of breach of restriction. United States v. Doss, 15 M.J. 409 (C.M.A. 1983); see also United States v. West, 15 M.J. 183 (C.M.A. 1983) (summary disposition) (AWOL and escape from custody multiplicious).

4. AWOL and missing movement are multiplicious for sentencing purposes. United States v. Woolley, 25 C.M.R. 159 (C.M.A. 1958).

5. For an example of an unreasonable multiplication of charges in a failure to repair case (with dereliction of duty), see United States v. Taylor, 26 M.J. 7 (C.M.A. 1988).

6. But see United States v. Teters, 37 M.J. 370 (C.M.A. 1993) (holding that the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not ("elements test")) (overruling United States v. Baker, 14 M.J. 361 (C.M.A. 1983)).

IV. MISSING MOVEMENT. UCMJ art. 87.

A. Background. The offense of missing movement is a relative newcomer to military criminal law, arising out of problems encountered in World War II when members of units or ships failed to show up when their units or ships moved out. United States v. Smith, 2 M.J. 566 (A.C.M.R. 1976), aff'd (not discussing the missing movement offense), 4 M.J. 210 (C.M.A. 1978).

B. Purpose. The punitive article of missing movement was designed to cover offenses greater than mere AWOL but less than desertion. United States v. Smith, supra.

C. Elements.

1. That the accused was required in the course of duty to move with a certain ship, aircraft or unit;

2. That he knew or had reasonable cause to know of the prospective substantial movement of the ship, aircraft or unit;

3. That at a certain time and place alleged, the accused missed the movement;

4. That the missed movement was either through neglect or through design, as alleged;

5. That the movement was missed as a proximate result of the intentional or negligent conduct of the accused. (Note: this element is required only if the time of the prospective movement is not certain.)

D. Two Forms of Missing Movement.

1. Missing movement through design.

a. "Through design" means "intentionally." It refers to doing an act intentionally or on purpose and not through carelessness or by accident. MCM, 1984, Part IV, para. 11c(3).

b. Missing movement through design, being the more serious form of the offense, has a maximum punishment of dishonorable discharge, total forfeitures, confinement for two years, and reduction to E-1. MCM, 1984, Part IV, para. 11e(1).

2. Missing movement through neglect.

a. "Through neglect" means the failure to exercise the care or attention that a reasonably prudent person would have exercised under similar circumstances to assure that he or she would be present with the ship, aircraft, or unit at the time of the scheduled movement. MCM, 1984, Part IV, para. 11c(4).

b. The maximum punishment for missing movement through neglect is a bad conduct discharge, total forfeitures, confinement for one year, and reduction to E-1. MCM, 1984, Part IV, para. 11e(2).

E. General Requirements.

1. The word "movement" does not include practice marches which are to be of short duration with a return to the point of departure nor does it include minor changes in location of a unit such as from one side of a post to another. MCM, 1984, Part IV, para. 11c(1). Movement missed must be substantial in

terms of duration, distance and mission. Thus, missing a port call for MAC flight constituted missing movement of an aircraft within meaning of UCMJ art. 87. United States v. Graham, 16 M.J. 460 (C.M.A. 1983); United States v. Blair, 24 M.J. 879 (A.C.M.R. 1987); but see also United States v. Gibson, 17 M.J. 143 (C.M.A. 1984) (failure to report for an ordinary commercial flight does not constitute missing movement, not the type of movement contemplated by UCMJ art. 87).

2. Knowledge of the exact hour or even of the exact date of the movement is not required. MCM, 1984, Part IV, para. 11c.

3. The accused's knowledge may be shown by circumstantial evidence. United States v. Chandler, 48 C.M.R. 945 (C.M.A. 1974). Where one is under orders to go to a particular duty assignment as a passenger aboard a commercial aircraft and fails to do so, the service member may be charged under UCMJ art. 87. United States v. Lemley, 2 M.J. 1196 (N.C.M.R. 1976).

4. Going AWOL and proceeding to a place more than 1200 miles away was a failure to exercise due care contemplated in missing movement through neglect. United States v. Mitchell, 3 M.J. 641 (A.C.M.R. 1977).

5. Military judged erred by using the accused's plea of guilty to AWOL as evidence to establish an essential element of a separate charge of missing movement to which a plea of not guilty had been entered. United States v. Wahnon, 1 M.J. 144 (C.M.A. 1975).

6. An accused cannot be punished for both AWOL and missing movement through neglect or through design when the same absence forms the basis for both charges (i.e., AWOL and missing movement are multiplicious for sentencing). United States v. Posnick, 24 C.M.R. 11 (C.M.A. 1957); United States v. Bridges, 25 C.M.R. 383 (C.M.A. 1958). But see United States v. Teters, 37 M.J. 370 (C.M.A. 1993) (holding that the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not ("elements test")) (overruling United States v. Baker, 14 M.J. 361 (C.M.A. 1983)).

7. Failure to repair is a lesser included offense of missing movement. United States v. Smith, 2 M.J. 566 (A.C.M.R. 1976), aff'd, 4 M.J. 210 (C.M.A. 1978).

8. Some authority supports the proposition that UCMJ art. 87 does not reach every instance in which a service member misses a movement but is applicable only when the accused has an essential mission related to the movement, e.g., is an integral member of the unit or crew whose absence would potentially disrupt

the mission. Compare United States v. Gillchrest, 50 C.M.R. 832 (A.F.C.M.R. 1975) and United States v. Smith, 2 M.J. 566 (A.C.M.R. 1976), with United States v. Lemley, 2 M.J. 1196 (N.C.M.R. 1976) and United States v. St. Ann, 6 M.J. 563 (N.C.M.R. 1978).

9. Missing the move, rather than a particular mode of travel, is the gravamen of missing movement. United States v. Smith, 26 M.J. 276 (C.M.A. 1988).

10. An essential element of missing movement is that the movement actually occurred. This element may be inferred if the accused holds a ticket for a regularly scheduled commercial flight. United States v. Kapple, 36 M.J. 1119 (A.F.C.M.R. 1993).

V. DEFENSES TO UNAUTHORIZED ABSENCES.

A. Introduction. This section treats those defenses to unauthorized absence as they relate to unauthorized absence only. For a complete treatment of defenses to court-martial charges, see infra, chapter 5.

B. Interposition of the Statute of Limitations.

1. In time of war, there is no statute of limitations for AWOL and desertion. UCMJ art. 43(a).

a. Hostilities in Korea were "in time of war" until the armistice on 27 February 1953. United States v. Shell, 23 C.M.R. 110 (C.M.A. 1957).

b. Hostilities in Vietnam after 3 November 1964 constituted "in time of war" for suspension of the statute of limitations. United States v. Anderson, 38 C.M.R. 386 (C.M.A. 1968). "Time of war" ended 27 January 1973. United States v. Reyes, 48 C.M.R. 832 (A.C.M.R. 1974); United States v. Robertson, 1 M.J. 934 (N.C.M.R. 1976).

2. If the unauthorized absence begins in time of peace, the statute of limitations, if raised, will bar prosecution if the offense was committed more than 5 years before receipt of sworn charges by the summary court-martial convening authority. UCMJ art. 43(b). The statute of limitations is tolled while the accused is AWOL, beyond the authority of the United States to apprehend him, in custody of civil authorities, or in the hands of the enemy.

3. The burden of proof of showing timely charges is on the Government where the statutory period has apparently elapsed. United States v. Morris, 28 C.M.R. 240 (C.M.A. 1959).

4. Swearing of charges and receipt of the charges by the officer exercising summary court-martial jurisdiction over the

unit tolls the statute of limitations for the offenses charged. UCMJ art. 43(c); United States v. Johnson, 3 M.J. 623 (N.C.M.R. 1977); but see United States v. Arsneault, 6 M.J. 182 (C.M.A. 1979) (statute of limitations bars prosecution where new, rather than amended, charge sheet prepared after statute has expired).

5. Computation of time. A year is 365 days during regular years and 366 days in leap year. The date of the offense counts as the first day of the running of the statute and the date the summary court officer receives the charges does not count. United States v. Tunnel, 19 M.J. 819 (N.M.C.M.R. 1984); contra United States v. Reed, 19 M.J. 702 (N.M.C.M.R. 1984).

6. Where charges have been preferred and received by the summary court-martial convening authority and the statute of limitations has thus been tolled, minor amendments to the specifications do not void the tolling of the statute. United States v. Arbic, 36 C.M.R. 448 (C.M.A. 1966); but see United States v. Busbin, 23 C.M.R. 125 (C.M.A. 1957); United States v. Shell, 23 C.M.R. 110 (C.M.A. 1958); United States v. Gardenshire, 5 C.M.R. 620 (A.B.R. 1951); United States v. Hutzler, 5 C.M.R. 661 (A.B.R. 1951). Addition of an ending date to a previously sworn AWOL charge is a permissible amendment. United States v. Reeves, 49 C.M.R. 841 (A.C.M.R. 1975).

7. The rights accorded an accused under the statute of limitations may be waived when the accused, with full knowledge of the privilege, fails to plead the statute in bar of the prosecution or sentence. United States v. Troxell, 30 C.M.R. 6 (C.M.A. 1960).

8. The military judge has a duty to advise the accused of the right to plead the statute of limitations when it appears that the period of time has elapsed. United States v. Rodgers, 24 C.M.R. 36 (C.M.A. 1957); United States v. Brown, 1 M.J. 1151 (N.C.M.R. 1977).

9. If the accused is found guilty of a lesser included offense against which it appears the statute of limitations has run, the military judge must advise the accused in open session of his right to avail himself of the statute. R.C.M. 907(b)(2)(B); United States v. Wiedemann, 36 C.M.R. 521 (C.M.A. 1966); United States v. Cooper, 37 C.M.R. 10 (C.M.A. 1966); United States v. Jackson, 20 M.J. 83 (C.M.A. 1985).

C. Former Jeopardy.

1. No person can be tried a second time for the same offense without his consent. UCMJ art. 44(a).

2. When jeopardy attaches.

a. A proceeding which, after introduction of

evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused, is a trial. UCMJ art. 44(c); see also United States v. Scardina, 18 M.J. 571 (N.M.C.M.R. 1984).

b. Withdrawal of charges after arraignment but before presentation of evidence does not constitute former jeopardy, and denial of a motion to dismiss charges at a subsequent trial is proper. United States v. Wells, 26 C.M.R. 289 (C.M.A. 1958).

c. An accused, once tried for a lesser offense, cannot be tried for a major offense which differs from the lesser offense in degree only. In this regard, trial for AWOL bars subsequent trial for desertion. United States v. Hayes, 14 C.M.R. 445 (N.B.R. 1953).

d. The protection against double jeopardy does not rest upon a surface comparison of the allegations of the charges. It also involves consideration of whether there is a substantial relationship between the wrongdoing asserted in the one charge and the misconduct alleged in another. United States v. Lynch, 47 C.M.R. 498 (C.M.A. 1973).

e. As protection against successive prosecution for the same offense includes protection against double punishment, an accused cannot be prosecuted for an act which is part and parcel of an offense for which he was previously convicted. (An AWOL cannot be "broken up" into segments and the segments prosecuted consecutively or concurrently). United States v. Lynch, supra; but see United States v. Robinson, 21 C.M.R. 380 (A.B.R. 1956) (where after conviction for an AWOL and after disapproval of findings and sentence by the convening authority, accused was tried for the same period AWOL but from a different unit than was previously charged). The holding in Lynch may, however, have been undermined. In United States v. Francis, 15 M.J. 424, 429-30 (C.M.A. 1983), the court noted that the conclusion of Lynch "seems erroneous" in that lesser periods of AWOL are generally "comprehended" within longer charged absences, and the government is barred from later prosecuting for the shorter absence which commenced during the period encompassed by the original charge. The implication of the court seems to be that an accused can be convicted of two lesser periods of unauthorized absence provided the maximum sentence is no longer than that authorized for the original single longer absence for which the accused was brought to trial.

f. Double jeopardy does not attach when charges are dismissed for violating the Statute of Limitations. Thus, the government is not barred from prosecuting the accused on a charge sheet that had properly been received by the summary court officer within the period of the statute following dismissal of charges for

the same offense (but on a different charge sheet) that was not received within the period of the statute. United States v. Jackson, 20 M.J. 83 (C.M.A. 1985).

g. Nonjudicial punishment previously imposed under UCMJ art. 15 for a minor offense and punishment imposed under UCMJ art. 13 for a minor disciplinary infraction may be interposed as a bar to trial for the same minor offense or infraction. R.C.M. 907(b)(2)(D)(iv).

(1) "Minor" normally does not include offenses for which the maximum punishment at a general court-martial could be dishonorable discharge or confinement for more than one year. MCM, 1984, Part V, para. 1e.

(2) If an accused has previously received punishment under UCMJ art. 15 for other than a minor offense, the service member may be tried subsequently by court-martial; however, the prior punishment under UCMJ art. 15 must be considered in determining the amount of punishment to be adjudged at trial if the accused is found guilty at the court-martial. Id.; see UCMJ art. 15(f); R.C.M. 1001(c)(1)(B).

(3) An AWOL of 5 days which was accused's first offense was a "minor offense" which should have been dismissed upon motion after accused had previously been punished for the same offense under UCMJ art. 15. United States v. Yray, 10 C.M.R. 618 (A.B.R. 1953). An AWOL of 7 days, however, was not a "minor offense" for purposes of joinder of "major and minor offenses." United States v. Woods, 4 M.J. 807 (A.F.C.M.R. 1978).

D. Jurisdiction.

1. For jurisdiction generally, see DA Pam 27-173.

2. The mere fact of expiration of enlistment during a status of unauthorized absence did not terminate jurisdiction or the AWOL. United States v. Klunk, 11 C.M.R. 92 (C.M.A. 1953).

3. When unauthorized absence has been alleged, jurisdiction must be proved beyond a reasonable doubt instead of by the usual standard of preponderance. United States v. Marsh, 15 M.J. 252 (C.M.A. 1983). "The reason for such a rule is that the accused's status as a member of the military becomes, in effect, an element of the offense, when absence or desertion is charged." United States v. Spicer, 3 M.J. 689 (N.C.M.R. 1977); see also United States v. Bailey, 6 M.J. 965 (N.C.M.R. 1979). Query: is the NCMR created a new element for AWOL and desertion charges? Probably not, as the facts of the case indicate the defense specifically raised the jurisdiction issue with a Russo jurisdictional motion. This interpretation is supported by a different panel of the NCMR, discussing Spicer. United States v.

Locke, 4 M.J. 714, 716 (N.C.M.R. 1977).

E. Impossibility: The Inability to Return to Military Control.

1. When a servicemember is, due to unforeseen circumstances, unable to return at the end of authorized leave through no fault of his own, he has not committed the offense of AWOL as the absence is excused. MCM, 1984, Part IV, para. 10c(6); see also United States v. Hullum, 15 M.J. 261 (C.M.A. 1983); United States v. Calpito, 40 C.M.R. 162 (C.M.A. 1969); United States v. Franklin, 4 M.J. 635 (A.F.C.M.R. 1977); United States v. Lee, 16 M.J. 278 (C.M.A. 1983).

2. When a servicemember, already in an AWOL status, is unable to return because of sickness, lack of transportation or other disability, he remains in an AWOL status; however, the disability for part of the AWOL should be considered as an extenuating circumstance. MCM, 1984, Part IV, para. 10c(6).

3. Types of impossibility in AWOL situations.

a. Impossibility due to physical disability.

(1) Where accused was ill at the end of his authorized leave and where, on medical advice, he remained in bed for several days before turning himself in to military authorities, the military judge should have given instructions on the defense of physical inability. United States v. Amie, 22 C.M.R. 304 (C.M.A. 1957); see also United States v. Irving, 2 M.J. 967 (A.C.M.R. 1976); United States v. Edwards, 18 C.M.R. 830 (A.F.B.R. 1955).

(2) Evidence of accused's dental problems which went untreated because of a difference of professional opinion did not raise the defense of physical incapacity after the accused went AWOL to receive civilian dental treatment. United States v. Watson, 50 C.M.R. 814 (N.C.M.R. 1975) (accused was AWOL for 44 days).

(3) Where accused, returning to his ship, was robbed and knocked unconscious and, upon regaining consciousness the next day, immediately attempted to return to his ship, the defense of physical inability was raised. United States v. Mills, 17 C.M.R. 480 (N.C.M.R. 1954).

(4) The accused was robbed the night before he was due to return to his unit and made no effort to return other than to attempt to borrow money (refusing one offer), although he was aware of his duty to return and was physically able to do so. No defense of impossibility was found, especially because the accused did not contact military authorities or seek the aid of any

responsible civilian agency. United States v. Bermudez, 47 C.M.R. 68 (A.C.M.R. 1973).

b. Impossibility due to transportation misfortune.

(1) Where accused's car broke down while he was returning from a weekend pass and he elected to remain with his car until it was repaired, the Manual provision concerning "through no fault of his own" does not apply as his decision was for his own convenience. United States v. Kessinger, 9 C.M.R. 262 (A.B.R. 1952).

(2) Where an officer postponed his return from leave to assist a friend in filing an accident report, the absence was not excusable as involuntary as no inability to return existed. United States v. Scott, 9 C.M.R. 241 (A.B.R. 1952).

(3) Where an accused mistakenly took the wrong airline flight and thereafter had difficulty obtaining transportation to his unit, no valid defense of impossibility was found. The misfortune was foreseeable and due to his own fault. United States v. Mann, 12 C.M.R. 367 (1953).

c. Impossibility due to acts of God: sudden and unexpected floods; snow; storms; hurricanes; earthquakes; or any unexpected, sudden, violent, natural occurrence can be a defense. If the particular act of God (or nature) may be expected to occur, it is not a defense because it is foreseeable (such as a snowstorm after repeated snowstorm warnings in Minnesota in January).

d. Impossibility due to wrongful acts of third parties. This type of defense includes train wrecks, plane crashes, and explosions which are not caused by the accused's fault. These fact situations present a legitimate defense of impossibility.

e. Impossibility due to civilian confinement.

(1) The inability to return to military control depends on the accused's status at time of confinement and on the results of the civilian trial. The table below summarizes the rule. See generally MCM, 1984, Part IV, para. 10c(5).

Status of Service Member at Time of Confinement	Result of Civilian Trial		Prosecution for AWOL?
	Acquittal	Conviction	
(a) Delivery of soldier to civilian authorities under UCMJ art. 14	X	X	No
(b) AWOL	X	X	Yes
(c) Absent with leave	X		No
(d) Absent with leave*		X	Yes*

*AWOL begins at expiration of leave

(2) Discussion.

(a) Adjudication as a youthful offender is tantamount to a conviction within the meaning of MCM, 1984, Part IV, para. 10c(5). United States v. Myhre, 25 C.M.R. 294 (C.M.A. 1958).

(b) A soldier who voluntarily commits an offense while on authorized leave and is apprehended and detained by civilian authorities may be charged with AWOL for the period after his leave expired until his return to military control. United States v. Myhre, supra.

(c) Where a service member, while AWOL, is apprehended, detained and acquitted by civilian authorities, absent evidence of an attempt to return to military control, he is chargeable with the entire period of time. United States v. Grover, 27 C.M.R. 165 (C.M.A. 1958); United States v. Bowman, 49 C.M.R. 406 (A.C.M.R. 1974).

(d) Where accused was granted "special leave" to answer civilian charges, he could not later be convicted of AWOL for that time even if convicted by civilian authorities. United States v. Northrup, 31 C.M.R. 73 (C.M.A. 1961); United States v. Williams, 49 C.M.R. 12 (C.M.A. 1974).

(e) Absent an arrest on behalf of the military, an offer to turn the service member over to military authorities, or a notification that the civilian authorities are not going to prosecute, the Army does not have an affirmative duty to seek the release to military authorities of an absent soldier held in a civilian jail on civilian charges. United States v. Bowman, 49 C.M.R. 406 (A.C.M.R. 1974) (distinguishing United

States v. Keaton, 40 C.M.R. 212 (C.M.A. 1969)).

F. Mistake of Fact.

1. As AWOL is a general intent crime, a mistake of fact must be both honest and reasonable to constitute a defense. United States v. Scheunemann, 34 C.M.R. 259 (C.M.A. 1964). In specific intent crimes, such as desertion, however, the mistake of fact need only be honest to raise the defense. United States v. Hill, 32 C.M.R. 158 (C.M.A. 1962); R.C.M. 916(j).

2. Ordinary diligence is the test for reasonableness. United States v. Holder, 22 C.M.R. 3 (C.M.A. 1956).

3. The Government must prove beyond a reasonable doubt that the accused did not act under an honest and reasonable mistake when the defense of mistake is raised. United States v. Thompson, 39 C.M.R. 537 (A.B.R. 1968).

4. A servicemember who was ordered to go home to await orders for Vietnam and who waited for 2-1/2 years for the orders which never arrived was not guilty of AWOL. United States v. Davis, 46 C.M.R. 241 (C.M.A. 1973); see also United States v. Hale, 42 C.M.R. 342 (C.M.A. 1970).

5. Mere speculation by the trier of fact as to when an honest and reasonable mistake of fact ended and the unauthorized absence commenced is not sufficient to sustain a conviction for AWOL. United States v. Morsfield, 3 M.J. 691 (N.C.M.R. 1977).

G. Duress.

1. Duress or coercion is a reasonably grounded fear on the part of an actor that he or another innocent person would be immediately killed or would immediately suffer serious bodily injury if he did not commit the act. Duress is a defense to all offenses except where the accused kills an innocent person. R.C.M. 916(h).

2. The defense of duress is not limited to those circumstances where the accused feels that he personally is going to immediately be killed or suffer serious bodily injury. United States v. Jemmings, 1 M.J. 414 (C.M.A. 1976) (accused testified that his family had been threatened with death or serious bodily injury); see also United States v. Hullum, 15 M.J. 261 (C.M.A. 1983); United States v. Palus, 13 M.J. 179 (C.M.A. 1982).

3. The need of a service member to absent himself from a perilous situation at his duty station in order to find a safer place from threatened injury is not normally a good defense to AWOL. (Note: "Perilous" in this context does not refer to a hazardous combat situation.) United States v. Wilson, 30 C.M.R.

630 (N.B.R. 1960). Query the continued validity of Wilson. For example, in United States v. Roberts, 15 M.J. 106 (C.M.A. 1983) (summary disposition), the court found that sexual harassment and immediate threat to the physical safety of the accused's wife raised the defense of duress to an unauthorized absence. See United States v. Roberts, 14 M.J. 671 (N.M.C.M.R. 1982).

4. Accused's fear that work to which he was assigned in the mess hall would aggravate his eye injury and commander's causing accused to be evicted forcibly from his off-post residence did not constitute the affirmative defense of duress in an AWOL case. United States v. Guzman, 3 M.J. 740 (N.C.M.R. 1977).

5. Accused was not entitled to duress defense because he had a reasonable opportunity to avoid going AWOL. United States v. Riofredo, 30 M.J. 1251 (N.M.C.M.R. 1990); see generally TJAGSA Practice Note, Duress and Absence Without Authority, The Army Lawyer, Dec. 1990, at 34 (discusses Riofredo).

6. For a discussion of duress and necessity, see generally Milhizer, Necessity and the Military Justice System: A Proposed Special Defense, 121 Mil. L. Rev. 95 (1988).

DISRESPECT, DISOBEDIENCE, AND DERELICTION

VI. "SUPERIOR COMMISSIONED OFFICER DEFINED.

The status of one as the superior commissioned officer of another is an element of crimes involving disrespect (UCMJ art. 89), disobedience (UCMJ art. 90(2)), and assault in which the victim's status as a superior officer enhances the penalty (UCMJ art. 90(1)). The following rules are applicable to each of the above offenses.

A. Accused and Victim In the Same Armed Service.

1. The victim is the accused's "superior commissioned officer" if the victim is a commissioned officer superior in grade to the accused (not date of rank in the same grade).

2. The victim is the accused's "superior commissioned officer" if the victim is superior in command to the accused, even if the victim is inferior in grade to the accused.

3. The victim is not the accused's "superior commissioned officer" if the victim is superior in grade but inferior in command.

B. **Accused and Victim In Different Armed Services.**

1. The victim is the accused's "superior commissioned officer" if the victim is a commissioned officer and superior in the chain of command over the accused.

2. The victim is the accused's "superior commissioned officer" if the victim, not a medical officer nor a chaplain, is senior in grade to the accused and both are detained by a hostile entity so that recourse to the normal chain of command is prevented.

3. The victim is not the accused's "superior commissioned officer" merely because the victim is superior in grade to the accused. In United States v. Peoples, 6 M.J. 904 (A.C.M.R. 1979), however, the court cited with approval an Article 15 given under the theory of UCMJ art. 92(2) (failure to obey) for violating the order of an officer of another armed force who was not in the accused's chain of command.

4. In United States v. Merriweather, 13 M.J. 605 (A.F.C.M.R. 1982), the court disapproved the conviction of an airman of disrespect to two Navy medical officers. There was no command relationship where the accused merely spent two hours in a Navy emergency room.

C. **Commissioned Warrant Officers.**

1. All of the military services now have commissioned warrant officers. Both trial counsel and defense counsel should be alert as to whether a warrant officer in a particular case is commissioned or not. This is usually determined by reviewing the commissioning documents in the warrant officer's personnel file.

2. "Commissioned officer" includes a commissioned warrant officer. 10 U.S.C. § 101(15) (1988). See also, MCM, United States, R.C.M. 103 discussion.

3. In the Navy, a Chief Warrant Officer is a commissioned officer, the disobedience of whose order constitutes a violation of Article 90 of the Code. United States v. Kanewske, 37 C.M.R. 298 (C.M.A. 1967).

VII. "WARRANT OFFICER" OR "NONCOMMISSIONED OFFICER" DEFINED.

One's status as a WO or NCO is an element of those crimes involving insubordinate conduct toward such individuals, to include: disrespect (UCMJ art. 91(3)), disobedience (UCMJ art. 91(2)), and assault (UCMJ art. 91(1)).

A. Warrant Officers. Those individuals appointed as warrant officers to meet Army requirements for officers possessing particular skills and specialized knowledge. Although warrant officers usually perform specialized duties within the Army, they may under appropriate circumstances serve in command positions. See AR 135-100, AR 601-100, AR 611-112, and AR 611-101. See para. VI.C. above regarding "commissioned warrant officers."

B. Noncommissioned Officers.

1. Those in the rank of corporal (E-4) and above. AR 310-25.

2. Not a specialist. AR 310-25.

3. Not a victim who, though in the actual grade of PFC (E-3) or below or a specialist, is an "acting NCO." United States v. Sutton, 49 C.M.R. 248 (C.M.A. 1974).

C. "Superior" WO/NCO. UCMJ art. 91 protects warrant officers and noncommissioned officers from disrespect, assault, and disobedience when they are in execution of their office. The statute does not require a superior-subordinate relationship. If pleaded and proven, the fact the victim was superior to the accused and that the accused had knowledge of the victim's superior status is an aggravating factor which exposes the accused a greater maximum punishment. See generally MCM, 1984, Part IV, para. 15c (analysis).

VIII. DISRESPECT.

A. Defined.

1. Actions. United States v. Ferenczi, 27 C.M.R. 77 (C.M.A. 1958) (subordinate contemptuously turns and walks away from a superior who is talking to him); United States v. Van Beek, 47 C.M.R. 98 (A.C.M.R. 1973) (exploding gas grenade in absent officer's quarters).

2. Words. United States v. Montgomery, 11 C.M.R. 308 (A.B.R. 1953) ("Keep your Goddamn mouth shut, you field grade son-of-a-bitch or I'll tear you apart; I'll beat you to death you. . .; I'll bite your. . . off, you punk, you"); United States v. Dornick, 16 M.J. 642 (A.F.C.M.R. 1983) ("Hi, sweetheart").

3. Distinct bases. United States v. Wasson, 26 M.J. 894 (A.F.C.M.R. 1988) (when charged as disrespect by words only and not deportment, evidence of the manner in which the words were spoken is not relevant to guilt).

B. Knowledge.

The accused must be aware of the victim's status. United States v. Payne, 29 M.J. 899 (A.C.M.R. 1989).

C. Defenses.

1. Disrespect must be directed toward the victim. United States v. Sorrells, 49 C.M.R. 44 (A.C.M.R. 1974) (no disrespect when loud profanity was spoken in the presence of the superior but directed toward others present in the room); see also United States v. Alexander, 11 M.J. 726 (A.C.M.R. 1981) (accused's plea of guilty to disrespect to his first sergeant was not improvident on ground that his outburst was not directed toward that individual, where facts showed that accused became angry at having to open his locker for the first sergeant to check for contraband and he took his clothes out of his locker and threw them on floor at feet of first sergeant).

2. The victim was deserving--the divestiture defense. Misconduct on the part of a superior in dealing with a subordinate may divest the former of his authority and thus destroy his protected status if it was substantial departure from the required standards of conduct. See MCM, 1984, Part IV, para. 13c(5); see generally Milhizer, United States v. Collier and the Divestiture Defense, The Army Lawyer, Mar. 1990, at 3.

a. United States v. Cheeks, 43 C.M.R. 1013 (A.F.C.M.R. 1971) (victim's profanity toward the accused); United States v. Struckman, 43 C.M.R. 333 (C.M.A. 1971) (victim invites the accused to fight); United States v. Noriega, 21 C.M.R. 322 (C.M.A. 1956) (officer victim serving as bartender at enlisted men's party); United States v. McDaniel, 7 M.J. 522 (A.C.M.R. 1979) (no abandonment of NCO status by sergeant who places drunken and protesting soldier in cold shower); United States v. Pratcher, 14 M.J. 819 (A.C.M.R. 1982), aff'd, 17 M.J. 358 (C.M.A. 1984) (involvement in collecting debts contrary to regulation did not result in divestiture).

b. Superior commissioned officer did not abandon his rank and position of authority in dealing with accused by addressing accused as "boy" where accused himself neither regarded use of term as racial slur nor did he strike another NCO, who was also black, because of remark. United States v. Allen, 10 M.J. 576 (A.C.M.R. 1980); see United States v. King, 29 M.J. 885 (A.C.M.R. 1989) (striking a prisoner/accused who lunged at a guard did not amount to divestiture); United States v. Collier, 27 M.J. 806 (A.C.M.R. 1988) (use of profane language did not amount to divestiture).

c. An officer authorized to search the accused's quarters for narcotics exceeded the scope of his official authority

to search and was not in the execution of his office when, over the accused's protests, he proceeded to read a letter found in an envelope which he could see contained no contraband. Thus, evidence that the accused lightly pushed the officer while protesting his reading of the letter would not sustain a conviction of assaulting a superior officer in the execution of his office. United States v. Hendrix, 45 C.M.R. 186 (C.M.A. 1972).

d. Though the accused may not be convicted of an assault upon a superior under UCMJ Arts. 90 or 91 when the officer's conduct divests him of his status, the accused may be found guilty of the lesser included offense of assault under UCMJ art. 128. United States v. Richardson, 7 M.J. 320 (C.M.A. 1979).

e. Divestiture does not apply to disobedience. United States v. Cheeks, supra.

3. Commander who conducts search which subsequently is determined to be illegal does not divest himself of his rank or authority and is therefore due respect and obedience from subordinates. United States v. Lewis, 7 M.J. 348 (C.M.A. 1979).

4. Where officer asked serviceman why he did not stand at attention at time flag was being raised and in response to officer's order, but the officer did not warn serviceman of his rights, serviceman's statement that he did not have to respect the flag was inadmissible in prosecution relating to not respecting the flag but was admissible as to charge of disrespect toward superior officer. United States v. Lewis, 12 M.J. 205 (C.M.A. 1982).

D. Pleading Defects.

1. Disrespectful behavior must be alleged. If the words or acts which constitute the disrespectful conduct are innocuous, the pleadings will be fatally defective unless circumstances surrounding the behavior are alleged to detail the nature of insubordination. United States v. Smith, 43 C.M.R. 798 (A.C.M.R. 1971) (specification held insufficient which alleged that accused referred to a male victim as "man"); United States v. Sutton, 48 C.M.R. 609 (A.C.M.R. 1974) (specification held insufficient which alleged that accused said, "You had better get out of the man's room"); United States v. Barber, 8 M.J. 153 (C.M.A. 1979) (The words, "If you have something to say about me, say it to my face," as spoken by a subordinate to a superior noncommissioned officer, who was then in the execution of his office, were found to be disrespectful on their face. The court read the language to constitute a demand by the subordinate that the superior conform his official conduct to a standard imposed by the subordinate.)

2. Failure to allege victim's status as "his superior commissioned officer" may be fatal. The omission of the pronoun

"his" has been held to destroy a specification's legitimacy. United States v. Carter, 42 C.M.R. 898 (A.C.M.R. 1970); United States v. Showers, 48 C.M.R. 837 (A.C.M.R. 1974); contra United States v. Ashley, 50 C.M.R. 37 (N.C.M.R. 1974).

E. Disrespect as a Lesser Included Offense to Other Crimes.

1. To disobedience of a superior. United States v. Virgilito, 47 C.M.R. 331 (C.M.A. 1973); United States v. Croom, 1 M.J. 635 (A.C.M.R. 1975); but see United States v. Cooper, 14 M.J. 758 (A.C.M.R. 1982) (disrespect not lesser included offense to disobedience where disrespect subsequent to disobedience).

2. To assault. United States v. Van Beek, 47 C.M.R. 98 (A.C.M.R. 1973).

3. To threat. United States v. Ross, 46 C.M.R. 718 (A.C.M.R. 1969).

F. Additional Requirements for Disrespect to a Noncommissioned, Warrant, or Petty Officer.

1. The offensive words or conduct must be within the hearing or sight of the noncommissioned, warrant, or petty officer victim. This is not required in the case of a commissioned officer victim. MCM, 1984, Part IV, para. 15c(3); United States v. Van Beek, 47 C.M.R. 98 (A.C.M.R. 1973).

2. The noncommissioned, warrant, or petty officer victim, at the time of the offense, must be "in the execution of his office"; that is, be engaged in any act or service required or authorized to be done by him because of statute, regulation, order of a superior or military usage. United States v. Brooks, 44 C.M.R. 873 (A.C.M.R. 1971) (off-duty NCO working at EM Club as sergeant-at-arms held to be in execution of his office).

3. A commissioned officer is protected even if acting in a private capacity and off duty. United States v. Montgomery, 11 C.M.R. 308 (A.B.R. 1953) (officer victim involved in poker game).

IX. DISOBEDIENCE OF A SUPERIOR'S PERSONAL ORDERS. UCMJ arts. 90(2), 91(2).

A. The Order. The order must be directed to the accused personally. It does not include violations of regulations, standing orders, or routine duties. MCM, 1984, Part IV, para. 14c(2)(b); see United States v. Wartsbaugh, 45 C.M.R. 309 (C.M.A. 1972).

B. Receipt of the Order.

1. The prosecution must prove as an element of the offense that the accused had actual knowledge of the order. United States v. Pettigrew, 41 C.M.R. 191 (C.M.A. 1970).

2. All state of mind defenses apply. United States v. Crump, 39 C.M.R. 899 (A.F.B.R. 1968) (accused's honest and reasonable belief order was illegal a legitimate defense).

C. Status of the Victim. The accused's actual knowledge of the status of the victim as a superior is required, and all state of mind defenses apply. United States v. Oisten, 33 C.M.R. 188 (C.M.A. 1963) (voluntary intoxication).

D. Willfulness of Disobedience.

1. Disobedience must be "willful;" that is, an intentional act of noncompliance. Flouting of authority not required. United States v. Ferenczi, 27 C.M.R. 77 (C.M.A. 1958).

2. State of mind defenses apply. United States v. Young, 40 C.M.R. 36 (C.M.A. 1969) (voluntary intoxication).

3. In prosecution for willful failure to obey lawful order from NCO, MJ should have instructed members on lesser included offense of failure to obey lawful order, article 92, UCMJ, where evidence raised issue of whether accused's voluntary intoxication prevented him from having mental state of willfulness. United States v. Cameron, 37 M.J. 1042 (A.C.M.R. 1993).

E. Origin of the Order. The order must originate from the alleged victim, and not be the order of a superior for whom the alleged victim is a mere conduit. United States v. Marsh, 11 C.M.R. 48 (C.M.A. 1953); United States v. Sellers, 30 C.M.R. 262 (C.M.A. 1961) (officer who passes on order of superior and adds new requirements not a mere conduit); United States v. Gussen, 33 M.J. 736 (A.C.M.R. 1991) (evidence that accused disobeyed an order issued by brigade commander to entire brigade only supported finding of violation of orders in violation of Art. 92, UCMJ and not violation of a superior's personal order).

F. Form of an Order. The order must be a positive command, but the form in which it is expressed is immaterial. United States v. Mitchell, 20 C.M.R. 295 (C.M.A. 1955) (whether "order" was a command or mere advice is question of fact to be determined by court); United States v. Warren, 13 M.J. 160 (C.M.A. 1982) (officer telling accused "to settle down and be quiet" was not under the circumstances a positive command). The order can be expressed in a courteous rather than preemptory form. United States v. McLaughlin, 14 M.J. 908 (N.M.C.M.R. 1982).

G. Time for Compliance. The nature of disobedience. MCM, 1984, Part IV, para. 14c(2)(g).

1. When an order requires immediate compliance, accused's statement that he will not obey and failure to make any move to comply constitutes disobedience. United States v. Stout, 5 C.M.R. 67 (C.M.A. 1952) (order to join combat patrol). Time in which compliance is required is a question of fact. United States v. Cooper, 14 M.J. 758 (A.C.M.R. 1982) (order to go upstairs and change clothes not countermanded by subsequent order to accompany victim to orderly room where disobedience to first order complete); United States v. McLaughlin, 14 M.J. 908 (N.M.C.M.R. 1982) (order to produce ID card required immediate compliance).

2. Immediate compliance is required by any order which does not explicitly or implicitly indicate that delayed compliance is authorized or directed. United States v. Schwabauer, 34 M.J. 709 (A.C.M.R. 1992) (a direct order to "stop and come back here" was clear and unambiguous and required immediate obedience without delay). See also, United States v. Wilson, 17 M.J. 1033 (A.C.M.R. 1984); United States v. McLaughlin, 14 M.J. 908 (N.M.C.M.R. 1982); cf. United States v. Clowser, 16 C.M.R. 543 (A.F.B.R. 1954) (delay resulting from a sincere and reasonable choice of means of compliance is not a completed failure to obey).

3. When immediate compliance is required, disobedience is completed when the one to whom the order is directed first refuses and evinces an intentional defiance of authority. United States v. Vansant, 11 C.M.R. 30 (C.M.A. 1953).

4. For orders which require preliminary steps before they can be executed, the recipient must begin the preliminary steps immediately or the disobedience is complete. United States v. Wilson, 17 M.J. 1032 (A.C.M.R. 1984).

5. Apprehension of an accused before compliance is due is a legitimate defense to the alleged disobedience. See United States v. Williams, 39 C.M.R. 78 (C.M.A. 1968).

6. If an order is to be performed in the future, the accused's present statement of intent to disobey does not constitute disobedience. United States v. Squire, 47 C.M.R. 214 (N.C.M.R. 1973).

H. Matters in Defense.

1. The order lacks content. United States v. Oldaker, 41 C.M.R. 497 (A.C.M.R. 1969) (order "to train" given to soldier in BCT lacks content); United States v. Couser, 3 M.J. 561 (A.C.M.R. 1977) (order to resume training with unit is proper); United States v. Beattie, 17 M.J. 537 (A.C.M.R. 1983) (order to "follow the instructions of his NCO's" lacks content); United

States v. Bratcher, 39 C.M.R. 125 (C.M.A. 1969).

2. The order requires acts already required by regulation. United States v. Sidney, 48 C.M.R. 801 (A.C.M.R. 1974) (officer's order to comply with local arms safety regulation should have been charged under UCMJ art. 92); United States v. Wartsbaugh, 45 C.M.R. 309 (C.M.A. 1972) (order to comply with battalion uniform regulation should have been charged under UCMJ art. 92); but cf. United States v. Petterson, 17 M.J. 69 (C.M.A. 1983) (rationale of ultimate offense doctrine, discussed below, may apply).

3. The order is inconsistent with a service regulation. United States v. Roach, 29 M.J. 33 (C.M.A. 1989).

4. Repeated orders.

a. If the sole purpose of repeated personal orders is to increase the punishment for an offense, disobedience of the repeated order is not a crime. See United States v. Tiggs, 40 C.M.R. 352 (A.B.R. 1968).

b. Violation of a personal order is punishable as the major offense if it given for the purpose of having the superior's authority used to enforce the pre-existing duty and is intended to motivate accused to perform willingly. United States v. Petterson, 17 M.J. 69 (C.M.A. 1983); United States v. Landwehr, 18 M.J. 355 (C.M.A. 1984); United States v. Bethea, 2 M.J. 892 (A.C.M.R. 1976); cf. United States v. Greene, 8 M.J. 796 (N.C.M.R. 1980) (subsequent orders of superior commissioned officers merely reiterating original order of pretty officer with which they sought to obtain accused's compliance could not form basis for additional convictions for willful disobedience of lawful orders of superior commissioned officers).

c. Repeated orders are multiplicious for sentencing purposes. United States v. Bivins, 34 C.M.R. 527 (A.B.R. 1964); United States v. White, 40 C.M.R. 686 (A.C.M.R. 1969); United States v. Graves, 12 M.J. 583 (A.F.C.M.R. 1981).

5. Under previous law, nonperformance of the pre-existing duty is the offense of which the accused should be convicted. United States v. Quarles, 1 M.J. 231 (C.M.A. 1975) (court held maximum punishment cannot be increased by charging disobedience rather than failure to repair).

a. Orders imposing the condition of restraint. United States v. Nixon, 45 C.M.R. 254 (C.M.A. 1974) (officer's order to proceed to stockade was the first step of apprehension and disobedience should have been prosecuted under UCMJ art. 95 rather than UCMJ art. 90); United States v. Burroughs, 49 C.M.R. 405 (A.C.M.R. 1974); United States v. Jessie, 2 M.J. 573 (A.C.M.R. 1977).

b. Orders reenforcing UCMJ art. 86. A servicemember can be convicted and punished for both. United States v. Petterson, 17 M.J. 69 (C.M.A. 1983) (accused in AWOL status refused subsequent order to return to duty).

6. The defense of conflicting orders. United States v. Clausen, 43 C.M.R. 128 (C.M.A. 1971); United States v. Hill, 26 M.J. 876 (N.M.C.M.R. 1988); see United States v. Spencer, 29 M.J. 740 (A.F.C.M.R. 1989).

7. The accused must have knowledge of the order and of the authority of the person giving the order. United States v. Payne, 29 M.J. 899 (A.C.M.R. 1989).

X. VIOLATION OF A LAWFUL GENERAL REGULATION/ORDER. UCMJ art. 92(1).

A. Authority to Issue a General Order/Regulation. MCM, 1984, Part IV, para. 16c(1)(a).

1. President, Secretary of Defense, Secretary of Transportation, Secretary of the Army.

2. A GCM convening authority.

3. A flag or general officer in command.

4. Their superiors in command.

5. To be a lawful general order, the order must be issued as the result of the personal decision of a general officer. United States v. Bartell, 32 M.J. 295 (C.M.A. 1991).

6. See generally Nagle, Regulations in the Courtroom, 14 The Advocate 65 (1982).

B. Regulation Defects.

1. The regulation must prohibit conduct of the nature of that attributed to the accused in the specification. United States v. Sweitzer, 33 C.M.R. 251 (C.M.A. 1963); United States v. Finsel, 33 M.J. 739 (A,C.M.R. 1991); United States v. Horner, 32 M.J. 576 (C.G.C.M.R. 1991).

2. The regulation must apply to a group of persons which includes the accused. United States v. Jackson, 46 C.M.R. 1128 (A.C.M.R. 1973).

3. The regulation must purport to establish criminal sanctions against individuals rather than merely guidance for further implementation. United States v. Blanchard, 19 M.J. 196

(C.M.A. 1985); United States v. Nardell, 45 C.M.R. 101 (C.M.A. 1972); United States v. Scott, 46 C.M.R. 25 (C.M.A. 1972); United States v. Asfeld, 30 M.J. 917 (A.C.M.R. 1990); United States v. Breault, 30 M.J. 833 (N.M.C.M.R. 1990); United States v. Brunson, 30 M.J. 766 (A.C.M.R. 1990); United States v. Stewart, 2 M.J. 423 (A.C.M.R. 1975); United States v. Smith, 16 M.J. 694 (A.F.C.M.R. 1983); United States v. Horton, 17 M.J. 1131 (N.M.C.M.R. 1984).

4. That the specific alleged regulation was superseded before the accused's act is no defense if the same criminal prohibition was contained in a successor regulation, and the latter was in force at the time of the accused's crime. United States v. Grublak, 47 C.M.R. 371 (A.C.M.R. 1973).

5. A regulation which is facially overbroad may be salvaged by including a scienter or mens rea requirement. United States v. Cannon, 13 M.J. 777 (A.C.M.R. 1982); United States v. Bradley, 15 M.J. 843 (A.F.C.M.R. 1983).

6. Local regulations must not conflict with or detract from the scope of effectiveness of a regulation issued by higher headquarters. United States v. Green, 22 M.J. 711 (A.C.M.R. 1986); see United States v. Garcia, 21 M.J. 127 (C.M.A. 1985).

C. Knowledge.

1. Actual knowledge of the regulation or order is not an element of the crime. United States v. Tolkach, 14 M.J. 239 (C.M.A. 1982); United States v. Tinker, 27 C.M.R. 366 (C.M.A. 1959). Consequently, state of mind defenses are inapplicable. See United States v. Leverette, 9 M.J. 627 (A.C.M.R. 1980).

2. For knowledge to be presumed, a regulation must be properly published. United States v. Tolkach, 14 M.J. 239 (C.M.A. 1982) (Air Force general regulation properly published when received at official base repository).

3. To be enforceable against service members, local regulations need not be published in the Federal Register. United States v. Academia, 14 M.J. 582 (N.M.C.M.R. 1982).

D. Pleading.

1. A specification is defective if it fails to allege that the order or regulation is "general." United States v. Koepke, 39 C.M.R. 100 (C.M.A. 1969); United States v. Baker, 38 C.M.R. 144 (C.M.A. 1967); United States v. Watson, 40 C.M.R. 571 (A.B.R. 1969); but see United States v. Watkins, 21 M.J. 208 (C.M.A. 1986).

2. The manner in which the accused violated the general order or regulation must be alleged. United States v. Sweitzer,

33 C.M.R. 251 (C.M.A. 1977).

E. Proof.

1. At trial, the existence and content of the regulation will not be presumed. It must be established expressly by judicial notice or other evidence. United States v. Williams, 3 M.J. 155 (C.M.A. 1977); but see United States v. Mead, 16 M.J. 270 (C.M.A. 1983) (if trial was by military judge alone failure to prove existence of a regulation may be cured by a proceeding in revision or by an appellate court taking judicial notice under M.R.E. 201(a)).

2. The specification need not allege that an accused "wrongfully" violated a lawful general regulation. Allegation of the violation itself implies the unlawful nature of the conduct. United States v. Torrey, 10 M.J. 508 (A.F.C.M.R. 1980).

F. Exceptions. If a regulation provides that a certain class of persons shall be excepted from its terms, the Government's burden of establishing that the accused does not come within the exception will not arise until some evidence raises the issue. In this regard, exceptions are treated similarly to affirmative defenses. Once the evidence reasonably shows that the accused may come within the excepted class, the burden is then upon the Government to establish otherwise beyond a reasonable doubt. As with an affirmative defense, the issue may be raised by either prosecution or defense evidence. United States v. Cuffee, 10 M.J. 381 (C.M.A. 1981); United States v. Lavine, 13 M.J. 150 (C.M.A. 1982).

G. Application. Serviceperson need not be assigned to command of officer issuing general regulation in order to be subject to its proscriptions. United States v. Leverette, 9 M.J. 627 (A.C.M.R. 1980) (soldier on leave visiting Fort Campbell convicted of violating local general regulation).

H. Preemption. Regulation not to maltreat subordinates is preempted by article 93. United States v. Curry, 28 M.J. 419 (C.M.A. 1989).

I. Attempts. To attempt to violate a regulation under UCMJ art. 80, the accused must only intend to commit the proscribed act. Knowledge of the regulation is not required. United States v. Davis, 16 M.J. 255 (C.M.A. 1983); United States v. Foster, 14 M.J. 246 (C.M.A. 1982).

J. Constitutional Rights. "Show and tell" regulation, construed to require service member to show physical possession or documentation of lawful disposition, does not violate 5th amendment or article 31. United States v. Williams, 29 M.J. 112 (C.M.A. 1989); United States v. Smalls, 30 M.J. 666 (A.F.C.M.R. 1990).

XI. **FAILURE TO OBEY LOCAL ORDERS.** UCMJ art. 92(2).

A. The Order. Pertains to personal or written orders (for example, a unit SOP or a battalion directive). E.g. United States v. Woodley, 43 C.M.R. 197 (C.M.A. 1971); United States v. Wartsbaugh, 45 C.M.R. 309 (C.M.A. 1972).

B. Maximum Punishments. The maximum punishment set out in MCM, 1984, Part IV, para. 16e includes a bad conduct discharge and confinement for six months. A footnote, however, sets out certain limitations in this regard.

1. Specifically, it provides that the maximum punishment allowable in the Table of Maximum Punishments for UCMJ arts. 92(1) and (2) offenses is reduced if the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed or the violation is a breach of restraint imposed as a result of an order. This punishment reduction is only operative, however, where the lesser offense is the "gravamen of the offense." United States v. Simmons, 13 M.J. 431 (C.M.A. 1982) (gravamen of the offense was not being in the authorized uniform in violation of UCMJ art. 134 rather than failing to obey order of petty officer); United States v. Showalter, 35 C.M.R. 382 (C.M.A. 1965) (gravamen of offense was not being in the authorized uniform in violation of UCMJ art. 134 rather than failing to obey a general regulation).

2. Does the note's rationale extend beyond UCMJ art. 92 violations? See United States v. Burroughs, 49 C.M.R. 404 (A.C.M.R. 1974).

C. Origin of Order. The order need not originate in a superior.

1. The victim and the subject of the order must have a special status which imposes upon the accused the duty of obedience. United States v. Stovall, 44 C.M.R. 576 (A.F.C.M.R. 1971) (disobedience of order of military security policeman).

2. The accused must have actual knowledge of this duty to obey. United States v. Shelly, 19 M.J. 325 (C.M.A. 1985); United States v. Alexander, 11 C.M.R. 489 (A.B.R. 1953); see United States v. Peoples, 6 M.J. 904 (A.C.M.R. 1979).

D. Actual Knowledge. Actual knowledge of the order is required, United States v. Shelly, supra, and all state of mind defenses apply. United States v. Curtin, 26 C.M.R. 207 (C.M.A. 1958); United States v. Henderson, 32 M.J. 941 (N.M.C.M.R. 1991). In United States v. Jack, 10 M.J. 572 (A.F.C.M.R. 1980), the Air Force court set aside accused's conviction for unlawfully entering a female barracks during non-visiting hours in violation of a local regulation even though the authorized visiting hours were noted on

a sign at the building's entrance. Because the sign did not designate the authority issuing the order, the court held that the accused lacked the actual knowledge required for commission of a UCMJ art. 92(2) offense.

E. Negligent Disobedience Sufficient for Guilt. MCM, 1984, Part IV, para. 14(2)(f). United States v. Jordan, 21 C.M.R. 627 (A.F.B.R. 1955).

F. Amending Specification at Trial. In United States v. Johnson, 31 C.M.R. 296 (C.M.A. 1962), the Court of Military Appeals held that the UCMJ art. 92 offense of failure to obey is only incidentally concerned with the person issuing the order and, thus, a specification alleging such an offense could properly be amended without changing the nature of the offense where the only change was in the title of the officer alleged to have issued the order in question and the accused was not misled. Cf. United States v. Marsh, 11 C.M.R. 48 (C.M.A. 1953), where the court held that proof that an accused was guilty of willful disobedience of an officer's order (UCMJ art. 90(2)) did not establish his guilt of disobeying the same order issued by another officer. See also United States v. Jones, 8 C.M.R. 551 (N.B.R. 1953); United States v. Sweat, SPCM 15299 (A.C.M.R. 24 April 1981) (unpub).

XII. THE LAWFULNESS OF ORDERS/REGULATIONS.

A. The Burden of Establishing Lawfulness. MCM, 1984, Part IV, para. 14c(2)(a).

1. Orders and regulations are presumed to be lawful. United States v. Smith, 45 C.M.R. 5 (C.M.A. 1972); United States v. Horner, supra.

2. Once the defense raises the issue of lawfulness by some evidence, the prosecution has the burden to prove lawfulness beyond a reasonable doubt. United States v. Tiggs, 40 C.M.R. 352 (A.B.R. 1968).

B. Illegal Orders. MCM, 1984, Part IV, para. 14c(2)(a).

1. Orders that are not within the authority of the commander to issue are illegal. United States v. Gray, 20 C.M.R. 331 (C.M.A. 1956).

2. Orders unrelated to military duties are unlawful. United States v. Cherry, 22 M.J. 284 (C.M.A. 1986). "Military duty" includes all activities that are reasonably necessary to safeguard or promote the morale, discipline, and usefulness of members of a command. MCM, 1984, Part IV, para. 14c(2)(a)(iii).

a. Regulations restricting marriages of foreign-

based service personnel to local nationals are legal, United States v. Wheeler, 30 C.M.R. 387 (C.M.A. 1961), except insofar as they are "unreasonable." United States v. Nation, 26 C.M.R. 504 (C.M.A. 1958).

b. Regulations establishing a minimum drinking age for service personnel in a command abroad are legal. United States v. Manos, 37 C.M.R. 274 (C.M.A. 1967).

c. A military member may also be lawfully ordered not to consume alcoholic beverages as a condition of pretrial restriction if such order is reasonably necessary to protect the morale, welfare, and safety of the unit or accused; to protect victims or potential witnesses; or to ensure the accused's presence at the court-martial or pretrial hearings in a sober condition. United States v. Blye, 37 M.J. 92 (C.M.A. 1993). But see, United States v. Wilson, 30 C.M.R. 165 (C.M.A. 1961); United States v. Kochan, 27 M.J. 574 (N.M.C.M.R. 1988) (order not to drink alcohol until 21-years old not lawful); (order not to consume alcohol not unlawful but it must have a reasonable connection to a military duty.) United States v. Stewart, 33 M.J. 519 (A.F.C.M.R. 1991).

3. An order that has for its sole object a private end is unlawful, but an order that benefits the command as well as serving individuals is legal. United States v. Robinson, 20 C.M.R. 63 (C.M.A. 1955).

4. Although an order prohibiting or restricting loaning money at or above specified usurious interest rates would be lawful, a specific order prohibiting all loans between service personnel, except when expressly approved by the command, is unsupported by any military need and hence illegal. United States v. Smith, 1 M.J. 156 (C.M.A. 1975); United States v. Giordano, 35 C.M.R. 135 (C.M.A. 1964); but see United States v. McClain, 10 M.J. 271 (C.M.A. 1981) (court upheld a conviction for violation of a regulation making it illegal for permanent party personnel and trainees at Fort Jackson, South Carolina, to enter into a loan agreement, stating that the relative positions of the parties would preclude a true arm's-length transaction).

5. A regulation's limitation on the use of customs-free privileges in Korea is not fatally overbroad, is reasonably necessary to maintain good order, and is not an unjust limitation on personal rights. United States v. Lehman, 5 M.J. 740 (A.F.C.M.R. 1978).

6. Orders extending punishments beyond those lawfully imposed are illegal. United States v. McCoy, 30 C.M.R. 68 (C.M.A. 1960); United States v. Peoples, 6 M.J. 904 (A.C.M.R. 1979) (order excluding accused from billets of other units is legal and not an improper punishment or restraint).

7. Order not to write any checks unlawful. United States v. Alexander, 26 M.J. 796 (A.F.C.M.R. 1988).

8. Order to servicemember having the AIDS virus not to engage in "unsafe sex" lawful. United States v. Dumford, 30 M.J. 127 (C.M.A. 1990); United States v. Womack, 29 M.J. 88 (C.M.A. 1989); see generally Milhizer, Legality of the "Safe-Sex" Order to Soldiers Having AIDS, The Army Lawyer, Dec. 1988, at 4; TJAGSA Practice Note, The "Safe-Sex" Order Held to be Lawful When the "Victim" is a Civilian, The Army Lawyer, Aug. 1990, at 30 (discusses Dumford); TJAGSA Practice Note, Court of Military Appeals Decides AIDS-Related Cases, The Army Lawyer, Dec. 1989, at 32, 33-34 (discusses Womack).

9. Order to draw weapon lawful, despite the accused's second, incomplete application for conscientious objector status which was substantially the same as an earlier, denied application. United States v. Austin, 27 M.J. 227 (C.M.A. 1988).

10. Order to female officer to provide a urine sample under direct observation is not per se unlawful. Unger v. Ziemniak, 27 M.J. 349 (C.M.A. 1989).

11. Order to disassociate from neighbor's estranged wife found to be lawful, under the circumstances, as applied. United States v. Wine, 28 M.J. 688 (A.F.C.M.R. 1989); see generally TJAGSA Practice Note, Order to "Disassociate" Held to be Lawful, The Army Lawyer, Aug. 1989, at 38 (discusses Wine).

12. Order to have no further contact with girlfriend (whom the accused allegedly assaulted), an airman (whose property the accused allegedly stole) and a witness, unless the area defense counsel who first contacted, was lawful. United States v. Hawkins, 30 M.J. 682 (A.F.C.M.R. 1990); see generally TJAGSA Practice Note, An Order Restricting Accused's Conduct With Victims and a Witness Held to be Lawful, The Army Lawyer, Sep. 1990, at 35 (discusses Hawkins).

13. Order not to go to family residence where alleged sexual abuse victim lived was lawful. United States v. Button, 31 M.J. 897 (A.F.C.M.R. 1990).

14. Order to cook to shower before the start of the workday was lawful. United States v. Horner, 32 M.J. 576 (C.G.C.M.R. 1991).

15. All orders affecting the serviceperson's constitutional rights are not illegal. See United States v. Stockman, 17 M.J. 330 (A.C.M.R. 1973).

a. In Secretary of the Navy v. Huff, 444 U.S. 453 (1979), the Supreme Court upheld a local regulation requiring

servicepersons on base to receive prior approval from the base commander before circulating petitions addressed to members of Congress.

b. In Brown v. Glines, 444 U.S. 348 (1979), the Court upheld Air Force regulations requiring prior approval from commanding officers before petitions can be circulated on Air Force bases. The first amendment rights of military men must yield somewhat to the overriding demands of discipline and duty inherent in the military service, demands without civilian counterparts. The regulations protect a substantial governmental interest unrelated to the suppression of free expression. While 10 U.S.C. § 1034 ensures that individual servicemen can write to members of Congress without sending the communication through official channels, it does not cover the general circulation of a petition within a military base.

16. Extra Training (AR 600-20 (Army Command Policy and Procedure) at para. 5-6) specifically requires that extra training meted out to soldiers must be directly related to the deficiency which the commander is attempting to correct, e.g., remedial P.T. for a soldier who cannot pass the annual physical training test. See United States v. Hoover, 24 M.J. 874 (A.C.M.R. 1987); Kaczynski, "The School of the Soldier: Remedial Training or Prohibited Punishment?", The Army Lawyer, June 1981, at 17.

XIII. DERELICTION OF DUTY. UCMJ art. 92(3).

A. Source of the Duty--Regulation, Order, Custom, Treaty, Statute, SOP. United States v. Moore, 21 C.M.R. 544 (N.B.R. 1956) (duty imposed by regulation); United States v. Heyward, 22 M.J. 35 (C.M.A. 1986) (same duty arose from regulation and custom). "Duty" does not include nonmilitary tasks performed for pay after regular duty hours. United States v. Garrison, 14 C.M.R. 359 (A.B.R. 1954) (secretary/treasurer of NCO club). Where no duty to perform exists, an accused may not be convicted of dereliction of duty. United States v. Tanksley, 36 M.J. 428 (C.M.A. 1993).

B. Knowledge.

1. Prior to the 1984 Manual, knowledge of the duties to be performed was only an element for willful disobedience. The accused, however, must have had knowledge of the relevant facts which require him to perform the duty. United States v. Pratt, 34 C.M.R. 731 (C.G.B.R. 1963) (evidence insufficient to find accused guilty of failure to go to the rescue where not clear accused ever awakened enough to be aware a boat was in distress).

2. Relying on United States v. Curtin, 26 C.M.R. 207 (C.M.A. 1958) the drafters in MCM, 1984, Part IV, para. 16c(3)(b) have made knowledge of duties an element of negligent and culpably

inefficient dereliction as well. MCM, 1984, Part IV, para. 16c (analysis); United States v. Pratt, 34 C.M.R. 731 (C.G.B.R. 1963) (evidence insufficient to find accused guilty of failure to go to the rescue where not clear accused ever awakened enough to be aware a boat was in distress).

C. Standards for Dereliction.

1. Willful nonperformance of duty.

2. Nonperformance of duty resulting from lack of ordinary care; i.e., simple negligence. United States v. Lawson, 36 M.J. 415 (C.M.A. 1993) (LT's improper posting of guards); United States v. Dellarosa, 30 M.J. 255 (C.M.A. 1990) (weather reporting); United States v. Grow, 11 C.M.R. 7 (C.M.A. 1953) (failure to safeguard classified information); see generally TJAGSA Practice Note, Dereliction of Duty and Weather Reports, The Army Lawyer, Oct. 1990, at 41 (discusses Dellarosa). Ordinary care is that degree of care which a prudent and careful person would exercise in like circumstances. United States v. Ferguson, 12 C.M.R. 570 (A.B.R. 1953).

3. Culpable inefficiency which is not the result of ineptitude. United States v. Nichels, 20 M.J. 225 (C.M.A. 1985) (failure to audit postal funds).

D. Dereliction of Duty as a Lesser Offense to Other Crimes. Dereliction of duty, where the duty is premised upon a regulation or custom of the service, is not a lesser included offense of willful disobedience of a superior officer's order. United States v. Haracivet, 45 C.M.R. 674 (A.C.M.R. 1972); but see United States v. Green, 47 C.M.R. 727 (A.F.C.M.R. 1973) (dereliction of duty is a lesser included offense of failure to obey a lawful order).

E. Pleading.

1. The specification need not set forth the particular regulation, order or custom that the accused violated, United States v. Moore, 21 C.M.R. 544 (N.B.R. 1956), nor assert the accused was responsible for a certain duty of performance, United States v. Thacker, 36 C.M.R. 954 (A.B.R. 1966); United States v. McCall, 29 C.M.R. 86 (C.M.A. 1960), but it must spell out the nature of the inadequate performance alleged. United States v. Kelchner, 36 C.M.R. 183 (C.M.A. 1966).

2. The inadequacy of performance proved at trial must be identical to that inadequacy alleged in the specification. United States v. Smith, 40 C.M.R. 316 (C.M.A. 1969) (conviction reversed where accused charged with dereliction by failure to walk his post by sitting down on the post and evidence showed he was asleep in a building off the post); United States v. Swanson, 20

C.M.R. 416 (A.B.R. 1950) (conviction reversed where accused charged with dereliction by failure to forward funds and the finding was failure to properly handle funds).

F. Sufficiency of Evidence.

1. Evidence sufficient.

a. Evidence of hazarding a vessel was sufficient to sustain a conviction of the lesser included offense of dereliction of duty where a ship was run aground while the accused, serving as a navigator, was attempting to navigate a narrow passage on a dark night, using only one radar when others were available, and he failed to check his position even though he had been put on notice of possible error by combat intelligence reports. United States v. Sievert, 29 C.M.R. 657 (N.B.R. 1959).

b. Evidence was held sufficient to prove offense of dereliction of duty by accused who failed to maintain an alert and responsible watch while at the Officer of the Day's office. United States v. Stuart, 17 C.M.R. 486 (A.B.R. 1954).

c. Evidence was sufficient to establish that the accused, the athletic officer in the Special Service Section, was derelict in the performance of his duties concerning the furnishing of transportation for a military athletic team because he gave money to a man on the team with the instructions to see that the team got home, instead of personally arranging for transportation. United States v. Voelker, 7 C.M.R. 102 (A.B.R. 1953).

d. Accused had certain duties as a mess fund custodian; evidence that he failed to reconcile his bank statements and kept money in his footlocker was held sufficient to show dereliction of duty. United States v. Taylor, 13 C.M.R. 201 (A.B.R. 1953); see United States v. Nichels, 20 M.J. 225 (C.M.A. 1985).

e. Accused's conviction of dereliction of duty for blowing his nose on the American flag while he was a member of the flag detail did not violate First Amendment. United States v. Wilson, 33 M.J. 797 (A.C.M.R. 1991)

2. Evidence insufficient. Accused, ranking NCO in charge of a truck transporting trainees, was held not derelict in his duties for permitting the driver to drive in a negligent manner as no evidence showed that the accused neglected to do anything required. Furthermore, the attempt of the accused to escape from the vehicle in the last few seconds before the accident does not show disregard of duties toward his men. United States v. Flaherty, 12 C.M.R. 466 (A.B.R. 1953).

XIV. ENLISTMENT DEFINED.

A. Enlistment: A Contract Which Changes "Status."

1. Valid Enlistments. In re Grimley, 137 U.S. 147 (1890).

a. A valid contract creates military status.

b. A breach of the contract does not affect status.

c. Incapacity to contract may prevent the existence of status.

d. Contracting involuntarily may prevent the existence of status.

2. Void Enlistments--No Status.

a. Statutory Disqualifications.

(1) Insanity, intoxication. 10 U.S.C. § 504.

(2) Felons, deserters. 10 U.S.C. § 504.

(3) Age. 10 U.S.C. § 505 (minimum age - 17).

(4) Citizenship status. 10 U.S.C. § 3253.

B. Regulatory Enlistment Criteria. AR 601-210.

1. No prior service applicants - Chapter 2.

2. Prior service applicants - Chapter 3.

C. Regulatory Disqualifications.

1. See United States v. Russo, 1 M.J. 134 (C.M.A. 1975) (accused suffered from dyslexia which severely impaired his ability to read and which disqualified him from enlistment).

2. Russo created a prophylactic rule which voided all enlistment contracts where recruiter misconduct existed. This resulted in numerous courts-martial where the accused defended by alleging the government had no jurisdiction over him because of recruiter misconduct, i.e., a void contract. Congress responded by amending UCMJ art. 2 to establish "constructive enlistments" (see C. below).

D. Involuntary Enlistment.

1. United States v. Catlow, 48 C.M.R. 758 (C.M.A. 1974) (accused's enlistment was involuntary and void at its inception where it had been entered into after he had appeared in court on civilian charges and the judge told him his only choice was between 5 years in jail or enlistment in the Army for 3 years).

2. United States v. Lightfoot, 4 M.J. 262 (C.M.A. 1974) (accused's enlistment was not involuntary, where on advice of counsel in a criminal matter, the proposal of military service was made as an alternative choice to confinement, and where the recruiter processed the enlistment without knowledge that the criminal proceedings had been dismissed against the accused contingent on his entrance into the military. See also, United States v. Ghiglieri, 25 M.J. 687 (A.C.M.R. 1987).

E. The Codification of In Re Grimley.

1. UCMJ art. 2 (as amended in 1979):

> "(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) of this section, and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.
>
> (c) Notwithstanding any other provision of law, a person serving with an armed force who--
>
> (1) submitted voluntarily to military authority;
>
> (2) met the mental competence and minimum age qualifications of sections 504 and 505 of his title at the time of voluntary submission to military authority;
>
> (3) received military pay or allowances; and
>
> (4) performed military duties;
>
> is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned."

2. Recruiter misconduct or intoxication at the time of the oath can be cured by "constructive enlistment." United States

v. Hirsch, 26 M.J. 800 (A.C.M.R. 1988).

3. Constructive enlistment applied to reservist on active duty training (ADT). United States v. Ernest, 32 M.J. 135 (C.M.A. 1991).

4. A court-martial is competent to determine enlistment misrepresentation claims. Woodrick v. Divich, 24 M.J. 147 (C.M.A. 1987). But habeas corpus is the appropriate remedy and courts-martial should give careful consideration to appropriate demands of comity if related proceedings are in a federal court.

XV. FRAUDULENT ENLISTMENT, APPOINTMENT, OR SEPARATION. UCMJ art. 83.

A. Introduction.

"Any person who--

1. procures his own enlistment or appointment in the armed forces by knowingly false representation or deliberate concealment as to his qualifications for that enlistment or appointment and receives pay or allowances thereunder; or

2. procures his own separation from the armed forces by knowingly false representation or deliberate concealment as to his eligibility for that separation;

shall be punished as a court-martial may direct." UCMJ art. 83.

B. Nature of The Offense. A fraudulent enlistment, appointment, or separation is one procured by either a knowingly false representation as to any of the qualifications or disqualifications prescribed by law, regulation, or orders for the specific enlistment, appointment, or separation, or a deliberate concealment as to any of those disqualifications. Matters that may be material to an enlistment, appointment, or separation include any information used by the recruiting, appointing, or separating officer in reaching a decision as to enlistment, appointment, or separation in any particular case, and any information that normally would have been so considered had it been provided to that officer. MCM, 1984, Part IV, para. 7c(1).

C. Fraudulent Enlistment or Appointment.

1. False Representation or Concealment.

a. Testimony of accused's recruiters and documentary evidence of traffic violations suggested that accused willfully concealed offenses and supported finding of fraudulent enlistment. United States v. Hawkins, 37 M.J. 718 (A.F.C.M.R.

1993).

b. Accused perpetrated a fraudulent enlistment by enlisting in the Marine Corps using his brother's name. United States v. Victorian, 31 M.J. 830 (N.M.C.M.R. 1990).

c. Accused falsely misrepresented her educational qualifications and willfully concealed her arrest record. United States v. Weigand, 23 M.J. 644 (A.C.M.R. 1986).

d. Accused fraudulently entered the Army on several occasions using, at varying times, eleven different names. United States v. Brown, 22 M.J. 597 (A.C.M.R. 1986).

2. Receipt of Pay or Allowances. An essential element of the offense of fraudulent enlistment or appointment is that the accused shall have received pay or allowances thereunder. Accordingly, a member of the armed forces who enlists or accepts an appointment without being regularly separated from a prior enlistment or appointment should be charged under Article 83 only if that member has received pay or allowances under the fraudulent enlistment or appointment. Acceptance of food, clothing, shelter, or transportation from the government constitutes receipt of allowances. However, whatever is furnished the accused while in custody, confinement, arrest, or other restraint pending trial for fraudulent enlistment or appointment is not considered an allowance. The receipt of pay or allowances may be proved by circumstantial evidence. MCM, 1984, Part IV, para. 7c(2).

D. Fraudulent Separation.

1. Accused's separation from the Army, procured after she submitted, as her own, a urine sample obtained from a pregnant servicewoman whom she knew, was fraudulently obtained and invalid; accordingly, accused remained subject to court-martial jurisdiction. Wickham v. Hall, 12 M.J. 145 (C.M.A. 1981). The 5th Circuit Court of Appeals affirmed a District Court ruling denying petitioner Wickham's request for habeas corpus relief, Wickham v. Hall, 706 F.2d. 713 (5th Cir. 1983).

2. Court-martial had jurisdiction to try and punish accused for offense of procuring his false separation from the armed forces. Accused apparently forged the signatures of several NCOs and the post commander's signature in order to obtain a DD Form 214. United States v. Cole, 24 M.J. 18 (C.M.A. 1987).

3. Accused was properly convicted (under article 80, UCMJ) of attempting to procure a fraudulent separation from the Air Force for making a false sworn statement that he was a homosexual and had engaged in homosexual activities. United States v. Horns, 24 C.M.R. 663 (A.F.B.R. 1957). See also, United States v. Marshall, 40 C.M.R. 138 (C.M.A. 1969) (attempting to procure a

fraudulent enlistment in violation of article 80, UCMJ).

E. One Offense. One who procures one's own enlistment, appointment, or separation by several misrepresentations or concealments as to qualifications for the one enlistment, appointment, or separation so procured, commits only one offense under Article 83. MCM, 1984, Part IV, para. 7c(3).

F. Interposition of the Statute of Limitations.

1. Plea of guilty to fraudulent enlistment was improvident because prosecution of that offense was barred by the statute of limitations and the record failed to indicate that the accused was aware of the availability of that plea in bar. United States v. Victorian, 31 M.J. 830 (N.M.C.M.R. 1990).

2. Defense counsel's failure to argue that statute of limitations barred accused's conviction for fraudulent enlistment fell below minimum acceptable level of competence demanded of attorneys. United States v. Jackson, 18 M.J. 753 (A.C.M.R. 1984).

G. Related Offense.

Fraudulent extension of enlistment by means of a false official statement, charged as a violation of article 134, UCMJ, was not barred by operation of the preemption doctrine on theory that it was otherwise cognizable as fraudulent enlistment or false official statement. United States v. Wiegand, 23 M.J. 644 (A.C.M.R. 1986).

XVI. EFFECTING UNLAWFUL ENLISTMENT, APPOINTMENT, OR SEPARATION. UCMJ art. 84.

A. Introduction.

"Any person subject to this chapter who effects an enlistment or appointment in or separation from the armed forces of any person who is known to him to be ineligible for that enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct." UCMJ art. 84.

B. Explanation. It must be proved that the enlistment, appointment, or separation was prohibited by law, regulation, or order when effected and that the accused then knew that the person enlisted, appointed, or separated was eligible for the enlistment, appointment, or separation. MCM, 1984, Part IV, para 8c.

C. Effecting an Unlawful Enlistment.

1. Conviction for effecting unlawful enlistment was not

precluded on ground that fraudulent testing of applicant was conducted in another recruiter's jurisdiction, where there was evidence that accused participated in the fraudulent testing scheme. United States v. Hightower, 5 M.J. 717 (A.C.M.R. 1978).

2. Accused's conviction for effecting an unlawful enlistment was proper where accused was involved in providing ineligible recruits with bogus high school diplomas. United States v. White, 36 M.J. 284 (C.M.A. 1993).

D. Effecting a Fraudulent Separation.

Accused's guilty plea to attempting to effect a fraudulent separation by making false representations pertaining to her marital status was provident. United States v. Vogler, ACM 29892 (A.F.C.M.R. 22 Sept. 1993) (unpub.).

MISCELLANEOUS MILITARY CRIMES

XVII. FRATERNIZATION.

A. Background.

1. It has been a long-established military custom that officers will not associate with enlisted persons on terms of military equality. Such associations are commonly defined as fraternization and have been punishable by court-martial.

2. This custom initially was founded on the officer's social superiority over enlisted persons. Thus, officers have been court-martialed for committing seemingly innocent acts of fishing, hunting and even bowling with enlisted personnel. This elitist approach, however, has been fairly discredited and the focus has shifted to whether the relationship prejudices good order and discipline in the unit.

3. Some occasions, such as Boss' Night, Right Arm Night and unit parties, encourage innocent forms of socializing. Because these occasions purport to foster esprit de corps, they are not criminal per se. Therefore, the surrounding circumstances must be examined more closely than the act itself. If the relationship breeds undue familiarity between the officer and enlisted person, then that relationship may adversely affect good order and discipline in the unit.

B. Defining Wrongful Fraternization.

1. Military case law.

a. Military case law suggests that wrongful

fraternization is more describable than definable. Usually, some other criminal offense was involved when officers were tried for this offense. Whatever the nature of the relationship, each case was clearly decided on its own merits with a searching examination of the surrounding circumstances rather than focusing on the act itself.

b. The legal test for describing or defining fraternization is found in United States v. Free, 14 C.M.R. 466 (N.B.R. 1953):

> Because of the many situations which might arise, it would be a practical impossibility to lay down a measuring rod of particularities to determine in advance what acts are prejudicial to good order and discipline and what are not. As we have said, the surrounding circumstances have more to do with making the act prejudicial than the act itself in many cases. Suffice it to say, then, that each case must be determined on its own merits. Where it is shown that the acts and circumstances are such as to lead a reasonably prudent person, experienced in the problems of military leadership, to conclude that the good order and discipline of the armed forces has been prejudiced by the compromising of an enlisted person's respect for the integrity and gentlemanly obligations of an officer, there has been an offense under Article 134. (Emphasis supplied.)

2. The 1984 Manual for Courts-Martial has incorporated case law and, for the first time, specifically includes fraternization between officer and enlisted personnel as an offense under UCMJ art. 134. The elements of the offense are:

a. That the accused was a commissioned or warrant officer;

b. That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

c. That the accused then knew the person(s) to be (an) enlisted member(s);

d. That such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and

e. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MCM, 1984, Part IV, para. 83.

3. Army Regulation.

a. Army Regulation 600-20 (Paragraph 5-7f), defines improper superior-subordinate relationships as follows:

> "Relationships between service members of different rank which involve (or give the appearance of) partiality, preferential treatment, or the improper use of rank or position for personal gain, are prejudicial to good order, discipline, and high unit morale. Such relationships will be avoided. Commanders and supervisors will counsel those involved or take other action, as appropriate, if relationships between service members of different rank--
>
> (1) Cause actual or perceived partiality or unfairness,
>
> (2) Involve the improper use of rank or position for personal gain, or
>
> (3) Can otherwise reasonably be expected to undermine discipline, authority, or morale."

The criminal offense of fraternization is not governed by AR 600-20. United States v. Stocken, 17 M.J. 826 (A.C.M.R. 1984) (the regulation is nonpunitive and provides guidance only).

b. This definition is offered to commanders as guidance in handling cases involving improper superior-subordinate relationships. Counseling and other administrative actions may certainly be taken when there is an actual or perceived appearance of wrongful "fraternization." Whether punitive action is appropriate is more difficult to decide. See DA Pam 600-35, Relationships Between Soldiers of Different Ranks, (7 Dec. 1993).

4. Case law and regulatory guidance can assist in developing a template for determining improper superior-subordinate relationships or wrongful fraternization.

a. If the relationship involves seniors and subordinates in the direct chain of command, every reason exists for restraining that relationship. A prudent commander should be able to articulate how such relationships can adversely affect the unit.

b. If no direct command authority by the senior over the subordinate is involved, the relationship may not be inherently improper. The surrounding circumstances must be examined in deciding if some adverse demonstrable impact on good order and discipline in the unit exists.

C. Charging Fraternization.

1. MCM Provision. Officers and warrant officers shall not associate with enlisted persons on terms of military equality. The maximum punishment for the offense is dismissal (DD for warrant officers), total forfeitures, and confinement for two years.

2. Prior case authority held that the offense of fraternization under the MCM did not apply to senior enlisted persons. A charge against a first sergeant for "fraternizing" with lower enlisted persons could, however, be based on the violation of a regulation or policy letter proscribing such conduct. See United States v. Stocken, 17 M.J. 826 (A.C.M.R. 1984); United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981). Under more recent decisional law, enlisted fraternization may now be charged as a violation of UCMJ art. 134. United States v. Clarke, 25 M.J. 631 (A.C.M.R. 1987); United States v. Carter, 23 M.J. 683 (N.M.C.M.R. 1986); United States v. March, 32 M.J. 740 (A.C.M.R. 1991).

D. Regulating Fraternization.

Many commands have published regulations and policy letters concerning fraternization. Violations of regulations or policy letters are punishable under UCMJ art. 92, if:

1. The regulation or policy letter specifically regulates individual conduct without being vague or overbroad. See United States v. Callaway, 21 M.J. 770 (A.C.M.R. 1986); United States v. Adams, 19 M.J. 998 (A.C.M.R. 1985); United States v. Moorer, 15 M.J. 520 (A.C.M.R. 1983); United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981);

2. The regulation or policy letter indicates that violations of the provisions are punishable under the UCMJ (directory language may be sufficient); and

3. The offender has knowledge of the regulation or policy letter. Service members are presumed to have knowledge of lawful general regulations if they are properly published. Actual knowledge of regulations or policy letters issued by brigade-size or smaller organizations must be proven. See generally United States v. Mayfield, 21 M.J. 418 (C.M.A. 1981); United States v. Tolkack, 14 M.J. 239 (C.M.A. 1982); see also United States v. Tedder, 24 M.J. 176, 1981 (C.M.A. 1987).

E. Options Available to Commanders.

1. Counsel the individuals involved.

2. Pursue other non-punitive measures (e.g., reassignment, oral or written admonitions or reprimands, adverse OER/EER, bar to reenlistment, relief, administrative elimination).

3. Consider nonjudicial or punitive action.

a. If the offense amounts to a social relationship between an officer and an enlisted person and strictly violates good order and discipline, it may be charged under UCMJ art. 134.

b. If the relationship violates other offenses such as adultery, sodomy, indecent acts, maltreatment, etc., the conduct should be alleged as such.

c. Other codal articles may be charged depending upon the specific facts of the case.

d. The conduct may be in violation of a regulation or order.

F. Fraternization Case List.

1. United States v. Livingston, 8 C.M.R. 206 (A.B.R. 1952). "[W]rongfully offering intoxicating liquor to, and drinking liquor with an enlisted man"; accused admitted to having a "weakness of a different kind" for the EM.

2. United States v. Free, 14 C.M.R. 466 (N.B.R. 1953). Accused convicted of sharing liquor with EM in his quarters; EM testified that after accepting invitation to spend the night in accused's quarters, he was awakened in night by accused getting into bed with him.

3. United States v. Lovejoy, 42 C.M.R. 210 (C.M.A. 1970). Accused convicted of sodomy and fraternization with enlisted member of submarine crew. Sodomy occurred at accused's on-shore apartment, which he had invited EM to share.

4. United States v. Pitasi, 44 C.M.R. 31 (C.M.A. 1971). Charges of sodomy set aside on appeal as unproven but conviction for fraternization based on same relationship upheld.

5. United States v. Froehlke, 390 F. Supp. 503 (D.D.C. 1975). Upheld conviction of warrant officer for undressing and bathing an enlisted woman (not his wife) with whom he had been drinking. Offense of unlawful fraternization held not unconstitutionally vague.

6. United States v. DeStefano, 5 M.J. 824 (A.C.M.R. 1978). Conviction under UCMJ art. 134 reversed because specification did not contain words alleging criminal conduct.

7. United States v. Conn, 6 M.J. 351 (C.M.A. 1979). Army lieutenant argued on appeal that offense of smoking marijuana off-post was not service-connected and won. But convictions for fraternization for smoking marijuana off-post with enlisted

personnel on two other occasions upheld.

8. United States v. Graham, 9 M.J. 556 (N.C.M.R. 1980). Navy lieutenant convicted under UCMJ art. 133 for conduct unbecoming an officer for smoking marijuana on shore with members of his ship's crew. Offense off-base, jurisdiction upheld.

9. United States v. Cooper, CM 438700 (A.C.M.R. 11 Aug 1980) (unpub.). Unmarried captain convicted under UCMJ art. 134 for sexual intercourse with two enlisted females who had formerly been in his unit. Court characterized conduct as "illicit sexual relations."

10. United States v. King, CM 440003 (A.C.M.R. 30 April 1981) (unpub.). "[C]onduct unbecoming an officer and gentleman by engaging in certain acts with a female member of the battery he commanded by . . . engaging in sexual intercourse with her and . . . unlawfully using marijuana with her in violation of Article 133, U.C.M.J."

11. United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981). "[W]rongfully socializing, drinking, and engaging in sexual intercourse with female receptees in violation of cadre-trainee regulation."

12. United States v. Stocken, 17 M.J. 826 (A.C.M.R. 1984). Army staff sergeant cannot be prosecuted under UCMJ art. 134 for fraternizing "on terms of military equality" with two female privates, absent a regulation prohibiting such behavior.

13. United States v. Tedder, 18 M.J. 777 (N.M.C.M.R., 1984). Conviction upheld of Marine Corps captain charged with a violation of UCMJ art. 134 for wrongfully fraternizing with a lance corporal. Court specifically held that A.F.C.M.R. decision in Johanns did not apply to the Navy or Marine Corps.

14. United States v. Johanns, 20 M.J. 155 (C.M.A. 1985). Decision of A.F.C.M.R. that "[C]ustom in the Air Force "against fraternization has been so eroded as to make criminal prosecution against an officer for engaging in mutually voluntary, private, non-deviate sexual intercourse with an enlisted member, neither under his command or supervision, unavailable [under UCMJ art. 134]." United States v. Johanns, 17 M.J. 862, 869 (A.F.C.M.R. 1983), affirmed.

15. United States v. Lowery, 21 M.J. 998 (A.C.M.R. 1986). Conviction upheld when accused officer had sexual intercourse with enlisted female, formerly under his command, where the female would not have gone to the accused's office to make an appointment but for the superior-subordinate relationship.

16. United States v. Carter, 23 M.J. 683 (N.M.C.M.R. 1986). After 1 August 1984 enlisted fraternization is punishable

under UCMJ art. 134 if it occurs under service discrediting or discipline prejudicing circumstances, assuming adequate due process notice.

17. United States v. Tedder, 24 M.J. 176 (C.M.A. 1987). Charges of unbecoming conduct based on officer having sexual relationship with enlisted woman Marine and seeking to have subordinates arrange dates for him with another subordinate Marine were not impermissibly vague.

18. United States v. Clarke, 25 M.J. 631 (A.C.M.R. 1987). In the future, NCOs are on notice that fraternization is punishable under UCMJ art. 134 if it occurs under service discrediting or discipline prejudicing circumstances.

19. United States v. Wales, 31 M.J. 301 (C.M.A. 1990). Accused's conviction for fraternization was reversed because the judge did not instruct that the members must find that the accused (an Air Force officer) was the supervisor of the enlisted member at the time of the alleged fraternization, and because the government did not prove that the accused's conduct violated a custom of the service. To prove a custom of the military service, proof must be offered by a knowledgeable witness--subject to cross-examination--about that custom.

20. United States v. Appel, 31 M.J. 314 (C.M.A. 1990). If the government relies on a violation of a custom as fraternization, it must prove the custom (Air Force accused). Proof of a military custom may not be based on judicial notice.

21. United States v. Thompson, 31 M.J. 781 (A.C.M.R. 1990). Military judge is entitled to take judicial notice of a post regulation proscribing fraternization.

22. United States v. Parrillo, 31 M.J. 886 (A.F.C.M.R. 1990) aff'd 34 M.J. 112 (C.M.A. 1992) Sexual relations with enlisted members under the accused officer's supervision violated an Air Force custom against fraternization.

23. United States v. Chesterfield, 31 M.J. 942 (A.C.M.R. 1990). Drinking and smoking hashish with subordinates constituted fraternization.

24. United States v. Arthur, 32 M.J. 541 (A.F.C.M.R. 1990). Accused officer's romantic relationship with an enlisted co-worker did not constitute fraternization.

25. United States v. March, 32 M.J. 740 (A.C.M.R. 1991). Maximum punishment for enlisted--fraternization is the same as that for officer--fraternization.

26. United States v. Fox, 34 M.J. 99 (C.M.A. 1992). Air Force fraternization specification must at least imply existence of a superior-subordinate or supervisory relationship and court members must be instructed that to find the accused guilty they must find the existence of such a relationship.

27. United States v. Blake, 35 M.J. 539 (A.C.M.R. 1992). Specification alleging fraternization between Army 1SG and female NCO in his company was fatally defective where it failed to allege a violation of Army custom, which is an essential element.

28. United States v. Boyett, 37 M.J. 872 (A.F.C.M.R. 1993). Determination in previous case (Johanns) that custom against fraternization in the Air Force had been so eroded as to make criminal prosecution against officer for engaging in mutually voluntary, private, nondeviate sexual intercourse with enlisted member, neither under his command nor supervision, unavailable was limited to state of customs reflected in record in that case, and would not preclude every prosecution for fraternization based on such conduct. (Per Heimberg, J., with three Judges concurring and one Judge concurring separately.).

XVIII. IMPERSONATING A SUPERIOR.

A. Charging. Impersonating an officer, warrant officer, or noncommissioned officer is a delict punishable under UCMJ art 134(1). United States v. Collymore, 29 C.M.R. 482 (C.M.A. 1960); United States v. Demetris, 26 C.M.R. 192 (C.M.A. 1958); United States v. Kupchick, 6 M.J. 766 (A.C.M.R. 1978).

B. Gravamen. The gravamen of the impersonation offense does not depend upon the accused deriving a benefit from the deception or upon some third party being misled, but rather upon whether the acts and conduct would influence adversely the good order and discipline of the armed forces. United States v. Messenger, 6 C.M.R. 21 (C.M.A. 1952); United States v. Frisbie, 29 M.J. 974 (A.F.C.M.R. 1990); Winthrop, Military Law and Precedents 726 (2d ed. 1920 Reprint); MCM, 1984, Part IV, para. 86c(1); TJAGSA Practice Note, Impersonating an Officer and the Overt Act Requirement, The Army Lawyer, Jul. 1990, at 42 (discusses Frisbie).

C. Intent. An intent to defraud may be plead and proven, however, as an aggravating factor. MCM, 1984, Part IV, para. 86b.

D. Related Offenses. Impersonating an officer, warrant officer, or noncommissioned officer differs from the offense of impersonating a CID agent or other agent of the federal government, in that the accused is not required to act out the part of the officer. Instead, merely posing as an officer is sufficient. United States v. Felton, 31 M.J. 526 (A.C.M.R. 1990); United States v. Wesley, 12 M.J. 886 (A.C.M.R. 1981); United States v.

Reece, 12 M.J. 770 (A.C.M.R. 1981); United States v. Adams, 14 M.J. 647 (A.C.M.R. 1982); see also TJAGSA Practice Note, Impersonating a CID Agent and the Overt Act Requirement, The Army Lawyer, Mar. 1991, at 21 (discusses Felton); Cooper, "Persona Est Homo Cum Statu Quodam Consideratus," The Army Lawyer, April 1981, at 17.

XIX. MALINGERING.

A. Defined. Malingering is defined as feigning illness, physical disablement, mental lapse or derangement, or intentionally inflicting self-injury, for the purpose of avoiding work, duty, or service. The essence of this offense is the design to avoid performance of any work, duty, or service which may properly or normally be expected of one in the military service. Hence, the nature or permanency of a self-inflicted injury is not material on the question of guilt. UCMJ art. 115; MCM, 1984, Part IV, para. 40c(1).

B. Elements.

1. The accused must be assigned to, or be aware of his prospective assignment to, or availability for, the performance of work, duty, or service.

a. All soldiers are inferred to be aware of their general, routine military duties. United States v. Mamaluy, 27 C.M.R. 176 (C.M.A. 1959).

b. With regard to special duties or prospective assignments (e.g., emergency deployment to hostile regions), the government must establish that accused had actual knowledge of such duties.

2. The accused must either feign illness or intentionally inflict personal injury.

a. United States v. Pedersen, 8 C.M.R. 63 (C.M.A. 1953). Accused was charged with intentionally shooting himself in order to be discharged from the Army but testified at trial that the injury was accidentally inflicted. No one witnessed the shooting, and the government had no admissible evidence with which to impeach the accused. As a result, the court held that the prosecution had failed in its proof and dismissed the charges.

b. United States v. Kisner, 35 C.M.R. 125 (C.M.A. 1964). Accused was charged with deliberately shooting himself in the foot in order to avoid transfer to Korea. After initially declaring that the injury was accidentally incurred, he confessed to intentionally inflicting the wound in order to avoid deployment to Korea. Because the record was devoid of any independent evidence to corroborate the confession, the Court of Military

Appeals reversed the conviction and dismissed the charge.

c. United States v. Belton, 36 C.M.R. 602 (A.B.R. 1966). Accused on orders to Vietnam, who refused to eat food over a period of time, resulting in his debility, intentionally inflicted self-injury for purposes of UCMJ art. 115.

d. United States v. Kersten, 4 M.J. 657 (A.C.M.R. 1977). An accused who induces a fellow soldier to drop a rock on his foot in order to be excused from a field training exercise is guilty of malingering under the theory of principals.

3. Feigned illness or intentionally inflicted injury must be for the purpose of avoiding work, duty, or service.

a. The words "work," "duty," and "service" are not restricted to one context or sense. The breadth of these terms would seem to cover all aspects of a serviceperson's official existence. Unquestionably, what the law intended to proscribe was a self-inflicted injury which would prevent the injured party from being available for the performance of all military tasks. See United States v. Mamaluy, 27 C.M.R. 176 (C.M.A. 1959) (A specification alleging in substance that the accused, for the purpose of avoiding confinement in the brig, intentionally injured himself by cutting his wrist with a razor blade was sufficient to allege an offense under UCMJ art. 115. The allegation that the injury was inflicted to escape confinement was sufficient, by fair implication, to allege a purpose to avoid either work, duty, or service.); United States v. Guy, 38 C.M.R. 693 (N.B.R. 1967) (A specification alleging intentional self-injury for the purpose of avoiding disciplinary action, by fair implication, states a purpose to avoid either work, duty, or service, as required by MCM, 1969, para. 194 (now MCM, 1984, Part IV, para. 40) and, accordingly, such specification is legally sufficient.); United States v. Johnson, 28 C.M.R. 629 (N.B.R. 1959) (a sailor who persuaded a friend to cut off his thumb was convicted of conspiracy to maim himself and malingering when the act was done as a means of avoiding further military duty.).

b. Intent or purpose may be established by circumstantial evidence, and it may be inferred that a person intended the natural and probable consequences of an act intentionally performed by him. United States v. Houghton, 32 C.M.R. 3 (C.M.A. 1962); but see United States v. Lawrence, 10 M.J. 752 (A.C.M.R. 1981) (court held that evidence which established only that the accused injured himself in order to halt an investigation into a false report he had filed was insufficient to support a conviction for malingering.)

c. Unsuccessfully attempting to commit suicide to avoid prosecution constitutes malingering. United States v. Johnson, 26 M.J. 415 (C.M.A. 1988); see TJAGSA Practice Note, Being

an Accused: "Service," But Not "Important Service," The Army Lawyer, Apr. 1989, at 55 (discusses Johnson).

d. Evidence of prior misconduct may be admissible against the accused for the limited purpose of establishing his wrongful intent. See United States v. Brown, 38 C.M.R. 445 (A.B.R. 1967) (where the accused was charged with malingering by intentionally shooting himself in the foot while on a combat mission in Vietnam, evidence that he had quit as a point man for a patrol the day before the shooting and had skulked in bringing up the rear and wanted to be evacuated and complained of headaches was relevant on the issue of intent); see also M.R.E. 404(b).

C. Defense of Accident. See United States v. Harrison, 41 C.M.R. 179 (C.M.A. 1970). Where an accused charged with malingering by intentionally shooting himself in the foot for the purpose of avoiding duty in the field testified he had a faulty weapon which discharged accidentally while he was dozing, the instructions on the elements of the offense and the defense of accident were prejudicially inconsistent where the court was advised it must find the accused intentionally inflicted injury upon himself by shooting himself in the foot, but the instructions on accident included the statement that even though the act is unintentional, it is not excusable where it was a result of or incidental to an unlawful act.

D. To Avoid Assigned Duty. See United States v. Yarborough, 5 C.M.R. 106 (C.M.A. 1952) (malingering to avoid assigned duty while before the enemy constitutes misbehavior punishable under UCMJ art. 99). See also, United States v. Glover, 33 M.J. 640 (N.M.C.M.R. 1991), (testimony required from people who knew what restrictions had been placed on accused's activity to show he was attempting to avoid assigned duties.)

E. Without Intent to Avoid Military Duty. See United States v. Taylor, 38 C.M.R. 393 (C.M.A. 1968). In Taylor, the evidence pertaining to a charge of malingering in violation of UCMJ art. 115 showed that the accused superficially slashed his arms with a razor blade in the presence of two cell mates in the brig, representing at the time that he wanted to outdo the performance of another inmate who had done the same thing earlier. The law officer instructed that intentional injury without a purpose to avoid service but under circumstances to the prejudice of good order and discipline was a lesser included offense, and the court could validly find the accused not guilty of the portion of the specification alleging the purpose of the injury to have been avoiding service and the accused guilty of being disorderly to the prejudice of good order and discipline in the armed forces in violation of UCMJ art. 134. Held: UCMJ art. 115 does not pre-empt the spectrum of self-inflicted injuries. See also United States v. Ramsey, 35 M.J. 733 (A.C.M.R. 1992).

XX. LOSS, DAMAGE, DESTRUCTION, OR WRONGFUL DISPOSITION OF MILITARY PROPERTY. UCMJ art. 108.

A. "Military Property" Defined.

1. For purposes of both art. 108 and 121, UCMJ, all appropriated funds belonging to the United States are within the meaning of the term "military property of the United States." United States v. Hemingway, 36 M.J. 349 (C.M.A. 1993). In addition all property, real or personal, owned, held, or used by a military service of the United States, regardless of use, is military property. United States v. Blevins, 34 C.M.R. 967 (A.F.B.R. 1964); MCM, 1984, Part IV, para. 52c; see generally TJAGSA Practice Note, Defining Military Property, The Army Lawyer, Oct. 1990, at 44. Appellate courts have held many varied and mundane items to be military property, including:

a. Watches. United States v. Ford, 30 C.M.R. 3 (C.M.A. 1960).

b. Examinations. United States v. Reid, 31 C.M.R. 83 (C.M.A. 1961).

c. Electric Drill. United States v. Foust, 20 C.M.R. 450 (A.B.R. 1955).

d. A gate. United States v. Meirthew, 11 C.M.R. 450 (A.B.R. 1953).

e. Sheets, mattress, and mattress cover. United States v Burrell, 12 C.M.R. 943 (A.F.B.R. 1953).

f. Sinks, pipes, and window casements. United States v. Tomasulo, 12 C.M.R. 531 (A.B.R. 1953).

g. Camera in ship's store. United States v. Simonds, 20 M.J. 279 (C.M.A. 1985).

h. Postal funds not military property. United States v. Spradlin, 33 M.J. 870 (N.M.C.M.R. 1991).

2. In United States v. Blevins, 34 C.M.R. 967 (A.F.B.R. 1964), evidence that blankets had been provided to the Air Force from federal resources, and that they were being used for military purposes was a sufficient showing that the blankets were "military property" within the purview of UCMJ art. 108.

3. Does not include property belonging to nonappropriated fund organizations which is not furnished to a military service for use by the military service. United States v. Geisler, 37 C.M.R. 530 (A.C.M.R. 1965) (property of officer's club); see United States v. Ford, 30 M.J. 871 (A.F.C.M.R. 1990) (en

banc); United States v. Thompson, 30 M.J. 905 (A.C.M.R. 1990); see generally TJAGSA Practice Note, Appropriated Funds as Military Property, The Army Lawyer, Jan. 1991, at 44.

4. Does not include property of the Army and Air Force Exchange Service. United States v. Underwood, 41 C.M.R. 410 (A.C.M.R. 1969); United States v. Schelin, 12 M.J. 575 (A.C.M.R. 1981), aff'd, 15 M.J. 218 (C.M.A. 1983). Navy courts have held, however, that property of the Navy Exchange is military property. United States v. Mullins, 34 C.M.R. 694 (N.C.M.R. 1964); United States v. Harvey, 6 M.J. 545 (N.C.M.R. 1978).

B. Property Need Not Have Been Personally Issued. The purpose of UCMJ art. 108 is to ensure that all military property, however obtained and wherever located, is protected from loss, damage, or destruction. As such, all persons subject to the UCMJ have an affirmative duty to preserve the integrity of military property. Failure to do so can result in prosecution under this provision, and whether the property involved had been issued at all or whether it had been issued to someone other than the accused is immaterial. United States v. O'Hara, 34 C.M.R 721 (N.B.R. 1964).

C. Pleading. The specification must as a whole or directly state that the property was military property of the United States. United States v. Rockey, 22 C.M.R. 202 (A.B.R. 1956); United States v. Schiavo, 14 M.J. 649 (A.C.M.R. 1982).

D. Multiplicity. Larceny and wrongful disposition of the same property are separately punishable. United States v. West, 17 M.J. 145 (C.M.A. 1984); see also United States v. Harder, 17 M.J. 1058 (A.F.C.M.R. 1983) (larceny and wrongful sale are separately punishable). But see United States v. Teters, 37 M.J. 370 (C.M.A. 1993) (holding that the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not ("elements test")) (overruling United States v. Baker, 14 M.J. 361 (C.M.A. 1983)).

E. Unlawful Sale of Military Property.

1. "Sale" defined. The term "sale" means an actual or constructive delivery of possession in return for a "valuable consideration," and the passing of such title as the seller may possess, whatever that title may be. United States v. Blevins, 34 C.M.R. 967 (A.F.B.R. 1964).

2. "Sale" distinguished from larceny.

a. The sale of property implies the transfer of at least ostensible title to a purchaser in return for a consideration. When the evidence merely shows that the accused, according to prior arrangements, stole property and delivered it

to one or more of his fellow principals in the theft, receiving payment for his services, no sale is made. United States v. Walter, 36 C.M.R. 186 (C.M.A. 1966).

b. Under proper circumstances, one transaction can constitute both a larceny and wrongful sale of the same property. United States v. Lucas, 33 C.M.R. 511 (A.C.M.R. 1962) (Where the accused and others, without authority and with intent to steal, took some automotive parts out of a government salvage yard and some fifteen minutes later sold them at a civilian junk yard, the law officer did not err in instructing the court that the offenses of larceny and wrongful sale were separate for punishment purposes, inasmuch as a hiatus existed between the larceny of the automotive parts and the sale thereof; the larceny was complete when the automotive parts were taken from the salvage yard; and the act of selling such parts did not constitute the final element of the larceny offense.)

3. Lack of knowledge as defense. Because the offense of wrongful sale of government property involves a general criminal intent, lack of knowledge as to ownership of the property constitutes an affirmative defense provided accused's actions are based on an honest and reasonable mistake. United States v. Germak, 31 C.M.R. 708 (A.F.B.R. 1961); United States v. Pearson, 15 M.J. 888 (A.C.M.R. 1983).

4. Multiplicity. An accused can be separately found guilty of wrongful sale under UCMJ art. 108 and concealment under UCMJ art. 134 of the same military property. United States v. Wolfe, 19 M.J. 174 (C.M.A. 1985). But see United States v. Teters, 37 M.J. 370 (C.M.A. 1993) (holding that the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not ("elements test")) (overruling United States v. Baker, 14 M.J. 361 (C.M.A. 1983)).

F. Wrongful Disposition of Military Property. Disposing of military property by any means other than sale is an offense under UCMJ art. 108 if such disposition is made without proper authority. For example, giving military property away without proper authorization constitutes an offense under this article. It makes no difference if the surrender of the property is temporary or permanent. United States v. Banks, 15 M.J. 723 (A.C.M.R. 1983).

G. Damaging, Destroying, or Losing Military Property.

1. Loss, damage, or destruction of military property under this provision may be the result of intentional misconduct or neglect.

2. Willfulness. Willful damage, destruction, or loss is one that is intentionally occasioned. It refers to the doing

of an act knowingly and purposely, specifically intending the natural and probable consequences thereof. United States v. Boswell, 32 C.M.R. 726 (C.G.B.R. 1962). Willful damage is a lesser included offense of sabotage under 18 U.S.C. § 2155. United States v. Johnson, 15 M.J. 676 (A.F.C.M.R. 1983); see United States v. Washington, 29 M.J. 536 (A.F.C.M.R. 1989); TJAGSA Practice Note, Damaging Property and Mens Rea, The Army Lawyer, Feb. 1990, at 66.

3. United States v. George, 35 C.M.R. 801 (A.F.B.R. 1965). Evidence that the accused removed perishable medical serums from a refrigerator in a medical warehouse in the tropics and left them at room temperature was sufficient to establish a willful destruction of government property although the purpose in removing the serums was to steal the refrigerator. The evidence established that the removal was intentional, and showing that the accused had a fully conscious awareness of the probable ultimate consequences of his purposeful act was unnecessary.

a. United States v. Creek, 39 C.M.R. 666 (A.C.M.R. 1967). The evidence was insufficient to sustain a conviction of willfully and wrongfully destroying an M26 fragmentation hand grenade, military property of the United States, where evidence existed that some sort of explosive device was detonated and some witnesses expressed the opinion it was a grenade because of the sound and damage done, when they all admitted it could have been anything else and another witness said it sounded like recoilless rifle fire while others declined to express an opinion.

b. United States v. Barnhardt, 45 C.M.R. 624 (C.G.C.M.R. 1971). Where the accused placed six metal objects in the starboard reduction gear of the cutter on which he was assigned and later, at the suggestion of a petty officer in whom he had confided, removed only the four objects he could see without reporting the remaining two, which he stated he thought might have fallen into the slump, the accused's plea of guilty to willfully damaging military property was provident; the intentional quality of the accused's conduct had not changed to negligence by his removal of some but not all of the foreign, metal objects from the gear.

c. United States v. Hendley, 17 C.M.R. 761 (A.F.B.R. 1954). The accused, who had been drinking, took a military police sedan without authority and was chased at high speed. In trying to evade his pursuers, he weaved in and out of traffic; narrowly missed one oncoming vehicle; subsequently sideswiped another; and finally went out of control, left the road, and smashed into several trees. The Board of Review only approved negligent damage to military property.

d. United States v. Peacock, 24 M.J. 410 (C.M.A. 1987). Placing rivets and nuts in an auxiliary fuel tank, thus temporarily impairing the aircraft's operational readiness,

constitutes willful damage to military property.

4. Negligence. Loss, destruction, or damage is occasioned through neglect when it is the result of a want of such attention of the foreseeable consequences of an act or omission as was appropriate under the circumstances.

a. United States v. Ryan, 14 C.M.R. 153 (C.M.A. 1954). The doctrine of res ipsa loquitur is not applicable to a prosecution for damaging a military vehicle through neglect, and the mere happening of a collision with resulting damage is not in itself sufficient to support a conviction for violation of UCMJ art. 108. Negligence must be affirmatively established by the prosecution evidence. Here, the accused was found guilty of damaging a government vehicle through neglect. The evidence showed that the accused was driving a jeep in the early morning hours, his headlights were on, he was driving on the right-hand side of the road, and he was operating the vehicle in second gear. He failed to make an attempted turn and drove against a guardrail opposite the intersection. No evidence indicated that the accused was driving at an excessive speed or in any sort of reckless manner, or that he was under the influence of alcohol, or that at the time of the accident he was engaged in the violation of traffic or other safety regulations of any nature. HELD: The evidence was wholly insufficient to support findings of guilt. See also United States v. Donnelly, 19 C.M.R. 549 (N.B.R. 1955).

b. United States v. Foster, 48 C.M.R. 414 (N.C.M.R. 1973). Conviction based on accused's guilty plea set aside and dismissed where providence inquiry established that accused, while on guard, operated a government forklift without permission and that while he was doing so the hydraulic brake line malfunctioned. No evidence of accused's actual negligence was established by the government.

c. United States v. Struck, 31 C.M.R. 148 (C.M.A. 1961). Although evidence was presented that a Navy vehicle turned over to the accused in good condition was damaged, and witnesses testified they saw the vehicle bump and heard a noise as the accused drove it through a gate, and evidence of paint scratches on the vehicle and the gate post indicated he must have struck the gate post, the evidence was insufficient to establish beyond a reasonable doubt that the vehicle was damaged through the accused's negligence. This is because the accused testified he had driven over a rock, evidence indicated that the road approaching the gate was bumpy and full of holes, and the gate was held open by a rock which could have been moved onto the road.

d. United States v. Lane, 34 C.M.R. 744 (C.G.B.R. 1963). The evidence was legally and factually sufficient to sustain findings of guilty of damaging and suffering damage to a Coast Guard vessel through neglect where the accused voluntarily

and intentionally turned two wheels controlling flood valves on a floating drydock in which the vessel was berthed, thereby consciously setting in motion a sequence of events which a reasonably prudent man would expect to end in some kind of harm; and if, as the court found, the precise form and shape of the injury to the vessel was not specifically intended, then it was the result of a lack of due solicitude on the part of the accused made punishable under UCMJ art. 108.

e. United States v. Traweek, 35 C.M.R. 629 (A.B.R. 1965). Evidence that a government helicopter in operating condition was parked, tied down, and covered and that it was subsequently found untied, uncovered and turned over on its side and wrecked and that the accused, who was on guard at the helicopter site, was lying unconscious a short distance from it was sufficient to corroborate accused's confession that he entered the helicopter to warm himself and caused the damage when he started the motor to generate heat.

f. United States v. Miller, 12 M.J. 559 (A.F.C.M.R. 1981). UCMJ art. 108 offense made out where accused who had control of a military truck permitted an unlicensed 16-year-old military dependent to operate truck resulting in accident and damage to vehicle.

g. MCM, 1984, Part IV, para. 32c(1). When items of individual issue are concerned, an inference is permitted that the damage, destruction, or loss shown, unless satisfactorily explained, was due to the neglect of the accused.

H. Suffering the Loss, Damage, Destruction, Sale or Wrongful Disposition of Military Property.

1. The word "suffer," as used in the UCMJ, does not have a meaning other than that accorded to it in the ordinary and general usage, i.e., is to allow, to permit, and not to forbid or hinder; also, to tolerate and to put up with. United States v. Johnpier, 30 C.M.R. 90 (C.M.A. 1961).

2. In charging an accused with the loss of military property, the word "suffer" may properly be used in alleging willful or intentional misconduct by the accused, as well as negligent dereliction on his part. United States v. O'Hara, 34 C.M.R. 721 (N.B.R. 1964); see also MCM, 1984, Part IV, para. 32c(2).

3. Where a member of the naval service intentionally loses military property by willfully pushing it over the side of his ship, he may be charged under UCMJ art. 108 of willfully suffering the loss or of wrongful disposition of military property. United States v O'Hara, 34 C.M.R. 721 (N.B.R. 1964).

I. Value.

1. Under all theories of prosecution under UCMJ art. 108, the government must establish as an element of proof the value of the property destroyed, lost, or sold, or the amount of damage to that property. MCM, 1984, Part IV, para 32b.

2. "In the case of loss, destruction, sale, or wrongful disposition, the value of the property controls the maximum punishment which may be adjudged. In the case of damage, the amount of damage controls. As a general rule, the amount of damage is the estimated or actual cost of repair by the government agency normally employed in such work, or the cost of replacement, as shown by government price lists or otherwise, whichever is less." MCM, 1984, Part IV, para. 32c(3).

3. In the case of the wrongful sale of stolen military property, it is the time of taking at which value is to be determined and the burden is on the prosecution to establish the property condition as of that time. United States v. Steward, 20 C.M.R. 247 (C.M.A. 1955).

4. Documents such as accounts receivable do not fall within the language of MCM, 1969, para. 200a(7) (now MCM, 1984, Part IV, para. 46c(1)(g)(iii)) as writings representing value, for, while they may record or even reflect value, they do not represent value as do negotiable instruments or other documents used to acquire goods or services. United States v. Payne, 9 M.J. 681 (A.F.C.M.R. 1980) (Accused who destroyed telephone toll records representing money owed to the Government by telephone users could not be convicted of destroying $4,000 in government property represented by the toll tickets. Instead, only a conviction for destruction of property of "some value" could stand.)

5. Various documents have been held to have the value they represent, including checks made out to other payees, United States v. Windham, 36 C.M.R. 21 (C.M.A. 1965); money orders, United States v. Sowards, 5 M.J. 864 (A.F.C.M.R. 1978); airline tickets, United States v. Stewart, 1 M.J. 750 (A.F.C.M.R. 1975); and gasoline coupons, United States v. Cook, 15 C.M.R. 622 (A.F.B.R. 1954).

6. A government price list is competent evidence of value, and may be the best method of proving the market value of government property; however, it is an administrative determination of value, not binding on a court-martial, but entitled to its consideration. Value also may be inferred from the nature of property. A court may properly consider other evidence of value; for example, the property's serviceability. United States v. Thompson, 27 C.M.R. 119 (C.M.R. 1958); United States v. Downs, 46 C.M.R. 1227 (N.C.M.R. 1973); MCM, 1984, Part IV, para. 46c(1)(g).

XXI. CONDUCT UNBECOMING AN OFFICER.

A. Acts Covered. UCMJ art. 133. Includes acts punishable under other articles of the UCMJ and offenses not so listed, except for minor derelictions which do not satisfy the requirements of UCMJ art. 133 under the circumstances. United States v. Taylor, 23 M.J. 314 (C.M.A. 1987) (UCMJ art. 133 conviction affirmed even where misconduct does not violate a punitive article); United States v. Clark, 15 M.J. 594 (A.C.M.R. 1983) (no UCMJ art. 133 violation for failure to repair under the circumstances); United States v. Sheehan, 15 M.J. 724 (A.C.M.R. 1983) (no UCMJ art. 133 violation for dereliction of duty by failing to meet a suspense or for a two-day AWOL under the circumstances). The gravamen of the offense is compromising the officer's standing as an officer and character as a gentleman or gentlewoman. United States v. Smith, 16 M.J. 694 (A.F.C.M.R. 1983) (not merely for borrowing money from subordinates).

1. United States v. Bonar, 40 C.M.R. 482 (A.B.R. 1969) (affirming conviction for driving in violation of a state justice of the peace's court order).

2. United States v. Wolfson, 36 C.M.R. 722 (A.B.R. 1965) (not every deviation in conduct constitutes unbecoming conduct; to be actionable conduct must be morally unbefitting and unworthy).

3. United States v. Graham, 9 M.J. 556 (N.C.M.R. 1980); United States v. DeStefano, 5 M.J. 824 (A.C.M.R. 1978) (smoking marijuana with enlisted subordinates constitutes unbecoming conduct).

4. United States v. Lindsay, 11 M.J. 550 (A.C.M.R. 1981) (lying to a criminal investigator about a subject of official investigation is conduct unbecoming an officer and gentleman. Even though making a false statement to a CID agent is generally no offense absent an independent duty to account, at least under the law at the time, the special status of an officer and the position of trust he occupies makes the intentional deceit a crime under UCMJ art. 133).

5. United States v. Schumacher, 11 M.J. 612 (A.C.M.R. 1981) (officer's public intoxication).

6. United States v. Coronado, 11 M.J. 522 (A.F.C.M.R. 1981) (even though the offense occurred off the military installation, jurisdiction was properly exercised by general court-martial which convicted accused of conduct unbecoming an officer and gentleman by performing acts of sodomy on an enlisted man).

7. United States v. Parini, 12 M.J. 679 (A.C.M.R. 1981) (colonel attempted to extract sexual favors from subordinates in return for favorable treatment).

8. United States v. Jefferson, 21 M.J. 203 (C.M.A. 1986) (adultery and fraternization); see United States v. Callaway, 21 M.J. 770 (A.C.M.R. 1986).

9. United States v. Sheehan, 15 M.J. 724 (A.C.M.R. 1983) (lying to superior go get a pass).

10. United States v. Timberlake, 18 M.J. 371 (C.M.A. 1984) (forging false PCS orders).

11. United States v. Norvell, 26 M.J. 477 (C.M.A. 1988) (dishonorable catheterization to avoid giving a valid urine sample, and then informing an enlisted person of this); see TJAGSA Practice Note, Drugs, Sex and Commissioned Officers: Recent Developments Pertaining to Article 133, UCMJ, The Army Lawyer, Feb. 1989, at 62 (discusses Norvell).

12. United States v. Shobar, 26 M.J. 501 (A.F.C.M.R. 1988) (sexual exploitation of civilian waitress under the accused's supervision).

13. United States v. Gunnels, 21 C.M.R. 925 (A.B.R. 1956) (taking money to procure a discharge).

14. United States v. Lewis, 28 M.J. 149 (C.M.A. 1989) (charging a fellow officer for tutoring in leadership); see TJAGSA Practice Note, Charging "Tuition" Can Constitute Conduct Unbecoming an Officer and a Gentleman, The Army Lawyer, Aug. 1989, at 36 (discusses Lewis).

15. United States v. Rushatz, 30 M.J. 525 (A.C.M.R. 1990) (advising junior officers how to overstate rent for off-post housing using backdated receipts).

16. United States v. Brunson, 30 M.J. 767 (A.C.M.R. 1990) (failing to pay a just debt).

17. Conviction reversed for visiting legal brothel with enlisted members where the accused did not seek or engage in sex, United States v. Guaglione, 27 M.J. 268 (C.M.A. 1988); see generally TJAGSA Practice Note, Drugs, Sex, and Commissioned Officers: Recent Developments Pertaining to Article 133, UCMJ, The Army Lawyer, Feb. 1989, at 62 (discusses Guaglione), and for merely loaning money to a subordinate. United States v. Smith, 16 M.J. 694 (A.F.C.M.R. 1983).

18. United States v. Frazier, 34 M.J. 194 (C.M.A. 1992). (officer's engaging in open and intimate relationship with wife of

enlisted soldier constituted conduct unbecoming an officer).

19. United States v. Hartwig, 35 M.J. 682 (A.C.M.R. 1992) (officer was properly convicted of conduct unbecoming based on his letter containing sexually suggestive comments to 14 year-old girl in response to her letter of support for Operation Desert Storm).

B. Not Constitutionally Deficient for Vagueness. Parker v. Levy, 417 U.S. 377 (1974).

C. Multiplicity.

1. If the same conduct is charged as prejudicial to good order and discipline under UCMJ art. 134 and conduct unbecoming an officer under UCMJ art. 133, the UCMJ art. 134 offense is a lesser included offense to the UCMJ art. 133 offense and should be dismissed. United States v. Rodriquez, 18 M.J. 363 (C.M.A. 1984). If the same conduct violates UCMJ art. 133 and another punitive article (i.e., UCMJ art. 123, forgery), the violation of the other punitive article is a lesser included offense to the UCMJ art. 133 offense and should be dismissed. United States v. Timberlake, 18 M.J. 371 (C.M.A. 1984). See also, United States v. Waits, 32 M.J. 274 (C.M.A. 1991).

2. All acts arising out of a single transaction were properly grouped in a single article 133 specification. United States v. Hart, 32 M.J. 101 (C.M.A. 1991).

3. But see United States v. Teters, 37 M.J. 370 (C.M.A. 1993) (holding that the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not ("elements test")) (overruling United States v. Baker, 14 M.J. 361 (C.M.A. 1983)).

D. Convening Authority's Determination to Take Officer Status into Account in Referring Cases for Trial by Court-Martial is Not Impermissible. United States v. Means, 10 M.J. 162 (C.M.A. 1981). (accused, an Air Force lieutenant, was convicted by a general court-martial of wrongful possession of small amounts of marihuana and amphetamines. On appeal he charged that he had been denied equal protection since similar charges against an enlisted man would have been tried by special court-martial. The Court of Military Appeals rejected this argument and held that the accused's status as an officer was a valid consideration in determining how to dispose of the case.)

E. Pleading. Failing to allege the act was dishonorable or conduct unbecoming an officer is not necessarily fatal. United States v. Wolfson, 36 C.M.R. 722 (A.B.R. 1966); United States v. Jefferson, 14 M.J. 806 (A.C.M.R. 1981); United States v. Wilson,

14 M.J. 680 (A.F.C.M.R. 1982).

F. Punishment. See generally United States v. Hart, 32 M.J. 101 (C.M.A. 1991).

XXII. ARTICLE 134.

A. Three Theories of Criminal Conduct under UCMJ art. 134.

1. Clause 1. The accused's conduct was to the prejudice of good order and discipline within the military community. United States v. Landsperger, SPCM 13213 (A.C.M.R. 25 May 1978) (unpub.) (UCMJ art. 134 cannot be used to make every mischievous act a court-martial offense. Soldier who wore dress over uniform to morning formation as prank was not guilty of UCMJ art. 134 offense).

2. Clause 2. The accused's conduct was of a nature to bring discredit upon the armed forces in the view of the civilian community. United States v. Snyder, 4 C.M.R. 15 (C.M.A. 1952); see United States v. Williams, 26 M.J. 606 (A.C.M.R. 1988). The conduct must be open and notorious to be service discrediting. Consider time, place and circumstances. United States v. Guerrero, 33 M.J. (C.M.A. 1991) (cross-dressing); United States v. Davis, 26 M.J. 445 (C.M.A. 1988); United States v. Berry, 20 C.M.R. 325 (C.M.A. 1956); see United States v. Hickson, 22 M.J. 146 (C.M.A. 1986). Conduct will be service discrediting where civilians are aware of both the military status and the discrediting behavior. United States v. Kirksey, 20 C.M.R. 272 (C.M.A. 1955). Violations of state or foreign law are not per se service discrediting. United States v. Sadler, 29 M.J. 370 (C.M.A. 1990); "Mooning" may constitute an offense under the service disorder clause of Article 134. United States v. Choate, 32 M.J. 423 (C.M.A. 1991). see generally TJAGSA Practice Note, Mixing Theories Under the General Article, The Army Lawyer, May 1990, at 66 (discusses Sadler).

3. Clause 3. The accused's conduct constituted a noncapital crime in federal law which is not punishable under another article of the UCMJ.

B. Conduct Punishable Under First Two Theories.

1. The general article is not "a catchall as to make every irregular, mischievous, or improper act a court-martial offense . . ." United States v. Sadinsky, 34 C.M.R. 343 (C.M.A. 1964); see also United States v. Scholten, 17 M.J. 826 (A.C.M.R. 1984). The discussion of the general article, from Colonel Winthrop's learned treatise to the Supreme Court in Parker v. Levy, 417 U.S. 733 (1974), emphasizes that the conduct proscribed must be recognized readily as being criminal and must have a direct and immediate adverse impact upon discipline. The conduct must be

directly and palpably prejudicial to good order and discipline. United States v. Sandinsky, supra; see, e.g., United States v. Thatch, 30 M.J. 623 (N.M.C.M.R. 1990) (mere drunkenness, without more, does not violate article 134).

2. Generally, no specific allegation is required that the conduct is a disorder or neglect. MCM, 1984, Part IV, para. 60c(6)(a); United States v. Williams, 24 C.M.R. 135 (C.M.A. 1957); United States v. Mayo, 12 M.J. 286 (C.M.A. 1982). When an allegation is made to denote as criminal that which would otherwise be innocent conduct, however, then the allegation of a disorder is critical. United States v. Regan, 11 M.J. 745 (A.C.M.R. 1981) (Here the court dismissed the following specification for failure to allege criminality: "[the accused] . . . threw butter on the ceiling in the dining facility of the 30th Engineer Battalion . . .").

3. MCM, 1984, Part IV, para. 61-113 describes some acts in violation of UCMJ art. 134.

4. Historically, other offenses have also been prosecuted. United States v. Light, 36 C.M.R. 579 (A.B.R. 1965) (borrowing money from subordinates); United States v. Baur, 10 M.J. 789 (A.F.C.M.R. 1981) (obstruction of justice); United States v. Pechefsky, 13 M.J. 814 (A.F.C.M.R. 1982) (forging credit recommendations).

5. These listings are not exhaustive and other novel offenses may be charged under the first two theories of the article, providing the offenses are not prosecutable elsewhere in the UCMJ. United States v. Wright, 5 M.J. 106 (C.M.A. 1978).

a. United States v. Limardo, 39 C.M.R. 866 (N.B.R. 1969); United States v. Menta, 39 C.M.R. 956 (A.F.B.R. 1968) (glue sniffing).

b. United States v. Johnson, 4 M.J. 770 (A.C.M.R. 1978) (peeping tom).

c. United States v. Kopp, 9 M.J. 564 (A.F.C.M.R. 1980) (wrongfully setting off a false alarm in a residential building at an Air Force base).

d. United States v. Woods, 28 M.J. 318 (C.M.A. 1989) (unprotected sexual intercourse where the accused has the AIDS virus); see TJAGSA Practice Note, Court of Military Appeals Decides AIDS-Related Cases, The Army Lawyer, Dec. 1989, at 32 (discusses Woods); see also United States v. Morris, 30 M.J. 1221 (A.C.M.R. 1990).

e. United States v. Davis, 26 M.J. 445 (C.M.A. 1988); United States v. Guerrero, 33 M.J. 295 (C.M.A. 1991) (cross-

dressing); see generally TJAGSA Practice Note, Cross-Dressing as an Offense, The Army Lawyer, Mar. 1991, at 42.

f. United States v. King, 34 M.J. 95 (C.M.A. 1992); United States v. Perez, 33 M.J. 1050 (A.C.M.R. 1991). Adultery.

g. United States v. Warnock, 34 M.J. 567 (A.C.M.R. 1991). Photographing nude female officer with her consent and showing negatives to enlisted paramour NOT prejudicial to good order and discipline under the circumstances.

h. United States v. Henderson, 32 M.J. 941 (N.M.C.M.R. 1991). Recruiter used position to sexually exploit recruits.

i. United States v. Wallace, 33 M.J. 561 (A.C.M.R. 1991). Child neglect, standing alone without a statute or punitive regulation, does not constitute an offense under article 134, U.C.M.J.

C. Violation of Crimes in Federal Law.

1. Some civilian criminal statutes may be prosecuted under UCMJ art. 134.

a. A civilian statute may not be prosecuted under UCMJ art. 134 if the same conduct is specifically punishable under another article of the UCMJ. In such a case the UCMJ provision must be used.

(1) United States v. Canatelli, 5 M.J. 838 (A.C.M.R. 1978) (prosecution for 18 U.S.C. § 842(h), possession of stolen explosives, is not precluded by UCMJ arts. 108 or 121).

(2) United States v. Sellars, 5 M.J. 814 (A.C.M.R. 1978) (prosecution under Texas auto burglary statute is not precluded by UCMJ arts. 129 (burglary), 130 (housebreaking), or 134 (unlawful entry)); see United States v. Wright, 5 M.J. 106 (C.M.A. 1978).

(3) United States v. Irvin, 13 M.J. 749 (A.F.C.M.R. 1982) (prosecution under Colorado child abuse statute not preempted).

b. Only noncapital civilian offenses may be prosecuted. United States v. French, 27 C.M.R. 245 (C.M.A. 1959) (capital espionage statute, though offered alternatively as service discrediting, is beyond court-martial jurisdiction).

c. A specification containing allegations of fact insufficient to establish a violation of a designated federal statute may nonetheless be sufficient to constitute conduct to the

prejudice of good order and discipline or to the discredit of the armed services. United States v. Mayo, 12 M.J. 286 (C.M.A. 1982) (even though improperly pleaded specification under 18 U.S.C. § 844(e) failed to allege a "bomb threat" offense under the U.S. Code, it was sufficient to support a conviction of prejudicial conduct under UCMJ art. 134); see generally United States v. Ridgeway, 13 M.J. 742 (A.C.M.R. 1982); United States v. Gould, 13 M.J. 734 (A.C.M.R. 1982).

d. A service member can be prosecuted for an attempt to commit a federal offense under UCMJ art. 134's "crimes and offenses not capital" clause, even if the underlying federal statute has no attempt provision. United States v. Craig, 19 M.J. 166 (C.M.A. 1985).

e. As well as noncapital federal crimes, state criminal statutes may be prosecuted if they are assimilated into federal law under the provisions of 18 U.S.C. § 13:

"Whoever within or upon any of the places now existing or hereinafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

(1) When the Assimilative Crimes Act was originally sponsored in the House of Representatives by Daniel Webster in 1825, Congress expressly adopted the fundamental policy of conformity to those local laws in force at time of enactment. The Act made no specific reference to subsequent repeals or amendments by the State to any assimilated laws or to new offenses that might be enacted. Because of this limitation, Congress thereafter enacted comparable Acts to include laws enacted subsequent to the passage of the previous Act and remaining in force at the time of the commission of the offense. The present language, adopted in 1948, applies to validly existing state laws regardless of when they were enacted, before or after the passage of the Act, and reflects every addition, repeal or amendment of a state law. United States v. Rowe, 32 C.M.R. 302 (C.M.A. 1962).

(2) The purpose of the Assimilative Crimes Act is to fill the gaps in criminal law on federal reservations by assimilating the local state law. It may not be used to extend or narrow the scope of existing federal criminal law. As such, when an existing federal statute covers the crime in question, it preempts the assimilation of local state law under 18 U.S.C. § 13. United States v. Picotte, 30 C.M.R. 196 (C.M.A. 1961). Similarly, if the offense is proscribed by the UCMJ, assimilation of state law

is preempted. In United States v. Wright, 5 M.J. 106 (C.M.A. 1978), a two-part test was given. First, did Congress intend to limit prosecution within a particular area or field to offenses defined in specific articles of the UCMJ? Second, is the offense charged a residuum of elements of a specific offense and asserted to be a violation of either UCMJ arts. 133 or 134? If the answer is affirmative to either question, preemption applies.

(a) The North Carolina kidnapping statute may not be assimilated because a specific federal statute (18 U.S.C. § 1201 (1972)) preempts the area. United States v. Perkins, 6 M.J. 602 (A.C.M.R. 1978); United States v. George, 6 M.J. 890 (A.C.M.R. 1979) (assimilating 18 U.S.C. § 1201); United States v. Dawkins, 7 M.J. 720 (A.C.M.R. 1979).

(b) A Texas statute prohibiting false reports of crimes may not be assimilated because specific federal statutes (18 U.S.C. § 1001 and UCMJ art. 107) cover the area. United States v. Jones, 5 M.J. 579 (A.C.M.R. 1978).

(c) Prosecution of cable television fraud using Hawaii statute was preempted by an applicable Federal statute on cable television fraud, 47 USC § 553(a) & (b). United Sates v. Mitchell, 36 M.J. 882 (N.M.C.M.R. 1993).

(d) No United States Code provision exists to preclude assimilation of Texas auto burglary statute. United States v. Sellars, 5 M.J. 814 (A.C.M.R. 1978).

(e) Georgia statute prohibiting hunting at night properly assimilated under UCMJ art. 134(3). United States v. Fishel, 12 M.J. 602 (A.C.M.R. 1981).

(f) Colorado child abuse statute properly assimilated. United States v. Irvin, 13 M.J. 749 (A.F.C.M.R. 1982), rev'd, 21 M.J. 184 (C.M.A. 1986).

(g) Maryland statute forbidding eluding police in a motor vehicle properly assimilated. United States v. Kline, 15 M.J. 805 (A.C.M.R. 1983).

(3) A violation of a state statute does not by itself constitute a violation of UCMJ art 134. The violation must, in fact and in law, amount to conduct to the discredit of the armed forces. Military courts have stated that the proper yardstick to be used to determine the criminality of an act made punishable by a state statute is its impact on good government in the military community, i.e., its direct and proximate impact on good order, discipline, or credit of the service. Such a showing must be made by the prosecution, and the military judge must instruct the court of its duty to find that such a showing has, in fact, been made. United States v. Grosso, 23 C.M.R. 30 (C.M.A.

1957) (conviction reversed where military judge failed to instruct court of its responsibility to find that violation of California libel statute was service discrediting); United States v. Rowe, 32 C.M.R. 302 (C.M.A. 1962) (where accused was charged under the North Carolina statute of leaving the scene of an accident, the court-martial could reasonably find that one convicted of a violation thereof would be guilty of conduct to bring discredit upon the armed forces).

(4) For a discussion of jurisdiction and pleading the Assimilative Crimes Act, see United States v. Perry, 12 M.J. 112 (C.M.A. 1981); and United States v. Geary, 30 M.J. 855 (N.M.C.M.R. 1990); United States v.Dallman, 34 M.J. 274 (C.M.A. 1992) and United States v. Jones, 34 M.J. 270 (C.M.A. 1992).

2. The problem of territoriality of federal crimes.

a. Most state and federal criminal statutes proscribe only conduct occurring within the territory of the state, the United States, its territories, districts or possessions -- or within the maritime jurisdiction. Such statutes may not be used in an UCMJ art. 134 prosecution for a crime occurring abroad. For a discussion of proving jurisdictional status, see United States v. Williams, 17 M.J. 207 (C.M.A. 1984); United States v. Zupan, 17 M.J. 1039 (A.C.M.R. 1984); United States v. Cuevas-Ovalle, 6 M.J. 609 (A.C.M.R. 1979) (an assimilated Canal Zone kidnapping statute is inapplicable to offense occurring in Panama.). See generally United States v. Scholten, 17 M.J. 171 (C.M.A. 1984).

b. A limited number of federal statutes do have extraterritorial application. See United States v. Clark, 41 C.M.R. 82 (C.M.A. 1969) (49 U.S.C. 1472(1)--aircraft piracy at an Air Base in Vietnam).

3. Preemption. Article 112a did not preempt prosecution for wrongfully possessing tetracycline. United States v. Davis, 32 M.J. 951 (N.M.C.M.R. 1991).

D. Penalties for Article 134 Offenses. See R.C.M. 1003(c).

1. For offenses listed in MCM, 1984, Part IV, the specified penalty controls.

2. For offenses not listed in MCM, 1984, Part IV, the following rules apply:

a. If the offense is closely related to an offense listed in Part IV (MCM 1984) or a lesser included offense, then the penalty provided in MCM, 1984, Part IV applies. United States v. Sellars, 5 M.J. 814 (A.C.M.R. 1978) (an assimilated Texas auto burglary statute was closely related to UCMJ art. 130, housebreaking, and should be punished with the UCMJ art. 130

penalty); United States v. Mayo, 12 M.J. 286 (C.M.A. 1982) (offense of communicating false bomb report was closely related to offense of making false official report under UCMJ art. 107 and should therefore be punished consistent with the UCMJ art. 107 penalty).

b. If an unlisted offense is included in a listed crime and is closely related to another, or is equally closely related to two or more listed offenses, the lesser penalty of the two listed crimes will apply.

c. If the penalty for an unlisted offense cannot be determined by applying the tests in a and b above--as is usually the case--then the penalty is that provided by the United States Code or as authorized by the custom of the service.

(1) Prosecution under 18 U.S.C. § 842(h), possession of stolen explosives, is punishable under the penalty provided in the federal statute.

(2) Wrongful and dishonorable defiling of the American flag is punishable under 4 U.S.C. § 3 and carries the maximum penalty provided for under that statute. United States v. Cramer, 24 C.M.R. 31 (C.M.A. 1957).

(3) When a state statute is assimilated, its penalty is also assimilated, and the latter becomes the "federal" penalty for purposes of comparison with the penalty provided for the like crime, if any, in the U.S. Code. The lesser of the two is the maximum punishment for court-martial purposes. United States v. Picotte, 30 C.M.R. 196 (C.M.A. 1961); United States v. Irvin, 13 M.J. 749 (A.F.C.M.R. 1982).

WARTIME RELATED OFFENSES AND ESPIONAGE

XXIII. WARTIME RELATED OFFENSES.

A. Offenses Available.

1. Desertion. UCMJ art. 85.
2. Assaulting or Willfully Disobeying Superior Commissioned Officer. UCMJ art. 90.
3. Misbehavior Before the Enemy. UCMJ art. 99.
4. Subordinate Compelling Surrender. UCMJ art. 100.
5. Improper Use of a Countersign. UCMJ art. 101.
6. Forcing A Safeguard. UCMJ art. 102.

7. Captured or Abandoned Property. UCMJ art. 103.

8. Aiding the Enemy. UCMJ art. 104.

9. Misconduct as a Prisoner. UCMJ art. 105.

10. Spies. UCMJ art. 106.

11. Espionage. UCMJ art. 106a.

12. Misbehavior of a Sentinel or Lookout. UCMJ art. 113.

13. Malingering. UCMJ art. 115.

14. Straggling. UCMJ art. 134.

15. Offenses by a Sentinel. UCMJ art. 134.

16. Other Offenses.

a. Failure to Obey Lawful General Regulation. UCMJ art. 92.

b. Dereliction of Duty. UCMJ art. 92.

c. Violation of Federal Statutes. UCMJ art. 134.

B. The "Triggers". Typically the offenses listed above can occur or become aggravated only when one of the two triggers below exist.

1. Time of War.

2. Before the Enemy.

C. Time Of War.

1. Definition. Time of war means a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that time of war exists. R.C.M. 103(19).

a. Definition applies only to R.C.M. 1004(c)(6) and to Parts IV and V of the Manual.

b. The UCMJ does not define time of war. R.C.M. 103(19), analysis.

c. The Court of Military Appeals (CMA) has held that time of war, as used in the UCMJ, does not necessarily mean declared war. Whether a time of war exists depends on the purpose

of the specific article in which the phrase appears.

d. For purposes of Art. 2a(10), time of war means a war formally declared by Congress. United States v. Avarette, 41 C.M.R. 363 (C.M.A. 1970).

e. Vietnam war was time of war for purposes of suspension of the statute of limitations under Art. 43. United States v. Anderson, 38 C.M.R. 386 (C.M.A. 1968).

2. CMA has examined the following circumstances to determine if time of war exists.

a. The nature of the conflict, i.e. there must exist armed hostilities against an organized enemy. United States v. Shell, 23 C.M.R. 110, 114 (C.M.A. 1957);

b. The movement and numbers of United States forces in the combat area;

c. The casualties involved;

d. Legislation, executive orders or proclamations concerning the hostilities. United States v. Bancroft, 11 C.M.R. 5 (C.M.A. 1953).

3. Geographical limitation of time of war.

a. Not limited with respect to Art. 43, UCMJ. United States v. Anderson, 38 C.M.R. 386 (C.M.A. 1968).

b. May be limited for other purposes. See United States v. Taylor, 15 C.M.R. 232 (C.M.A. 1954); United States v. Ayers, 15 C.M.R. 220 (C.M.A. 1954).

D. Applications.

1. Offenses which can occur only in time of war.

a. Improper use of a countersign. UCMJ art. 101.

b. Misconduct as a prisoner. UCMJ art. 105.

c. Spies. UCMJ art. 106.

2. Offenses which are capital offenses in time of war.

a. Desertion. UCMJ art. 85.

b. Willful Disobedience of a Superior Commissioned Officer's Order. UCMJ art. 90.

c. Misbehavior As A Sentinel. UCMJ art. 113.

d. Rape/Homicide. See R.C.M. 1004(c)(6).

3. Offenses where time of war is an aggravating factor.

a. Drug offenses. UCMJ art. 112a.

b. Malingering. UCMJ art. 115.

c. Offenses by a Sentinel. UCMJ art. 134.

XXIV. MISBEHAVIOR BEFORE THE ENEMY. UCMJ art. 99.

A. Enemy Defined.

Organized forces in time of war or any hostile body, including civilians, that may oppose U.S. forces. United States v. Monday, 36 C.M.R. 711 (A.B.R. 1966), pet. denied, 37 C.M.R. 471 (C.M.A. 1969).

B. Before The Enemy.

1. A question of tactical relation not of distance. A reasonable possibility of being called into action is sufficient. United States v. Sperland, 5 C.M.R. 89 (C.M.A. 1952).

2. Subsequent enemy contact may not be used to establish misconduct before the enemy. United States v. Terry, 36 C.M.R. 756 (N.B.R. 1965), aff'd, 36 C.M.R. 348 (C.M.A. 1966).

C. Nine Forms Of The Offense.

1. Running away.
2. Shamefully abandoning, surrendering, or delivering up command, unit, place, ship or military property.
3. Endangering safety.
4. Casting away arms or ammunition.
5. Cowardly conduct.
6. Quitting place of duty to plunder or pillage.
7. Causing false alarms.
8. Willfully failing to do utmost to encounter the enemy.
9. Failure to afford relief and assistance.

D. Elements.

1. That the accused committed an act of cowardice;

a. That this conduct occurred while the accused was before the enemy; and

b. That this conduct was the result of fear.

E. Applications.

1. Cowardice is misbehavior motivated by fear. Fear

is the natural feeling of apprehension when going into battle. United States v. Smith, 7 C.M.R. 73 (C.M.A. 1953).

2. The mere display of apprehension does not constitute the offense. United States v. Barnett, 3 C.M.R. 248 (A.B.R. 1951).

3. An intent to avoid combat does not in itself justify an inference of fear. United States v. Yarborough, 5 C.M.R. 106 (C.M.A. 1952).

4. Refusal to proceed against the enemy because of illness is not cowardice unless motivated by fear. United States v. Presly, 40 C.M.R. 186 (C.M.A. 1969).

5. Art. 99 covers the area of misbehavior before the enemy offenses. Art. 134 is not a catch-all. United States v. Hamilton, 15 C.M.R. 383 (C.M.A. 1954).

XXV. WAR TROPHIES.

A. Captured Or Abandoned Property. UCMJ art. 103.

1. Soldiers must give notice and turn over to the proper authorities without delay all captured or abandoned enemy property.

2. Soldiers can be punished for;

a. Failing to carry out duties described in a above.

b. Buying, selling, trading or in any way disposing of captured or abandoned property.

c. Engaging in looting or pillaging.

B. Unlawful Importation, Transfer, and Sale of a Dangerous Firearm. 26 U.S.C. §§ 5844, 5861.

XXVI. STRAGGLING. UCMJ art. 134.

A. Elements. UCMJ art. 134.

1. That the accused while accompanying the accused's organization on a march, maneuvers, or similar exercise, straggled.

2. That the straggling was wrongful, and

3. That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

B. **Explanation.**

1. Straggle means to wander away, to stray, to become separated from, or to lag or linger behind.

2. Must plead specific mission or maneuver. See MCM, 1984, Part IV, para. 107(c).

XXVII. ESPIONAGE.

A. Nature of the Offense. Art. 106a establishes a peace time espionage offense which is different from spying, a wartime offense, under UCMJ article 106.

B. **Three Theories for Espionage Cases.**

1. Violation of general regulations;

2. Assimilation of federal statutes under Art. 134, clause 3;

3. Violation of Art. 106 or 106a. See United States v. Baba, 21 M.J. 76 (C.M.A. 1985).

C. **Elements of Art. 106a.**

1. The accused communicated, delivered, or transmitted information relating to the national defense;

2. Information was communicated and delivered to a foreign government;

3. That the accused did so with the intent or reason to believe that such matter would be used to the injury of the United States or to the advantage of a foreign nation. MCM, 1984, Part IV, para. 30b(1).

D. Attempted Espionage. Unlike most UCMJ offenses, article 106a covers both espionage and any attempted espionage.

1. Accused's actions in enlisting aid of fellow sailor en route to delivering material to foreign embassy, removing classified documents from ship's storage facility and converting them to his own personal possession, and traveling halfway to embassy to deliver went beyond "mere preparation" and guilty plea to charge of attempted espionage was provident. United States v. Schoof, 37 M.J. 96 (C.M.A. 1993).

2. Where accused took several classified radio messages to Tokyo in order to deliver them to a Soviet agent named "Alex," his conduct was more than mere preparation and constituted attempted espionage in violation of article 106a, UCMJ. United States v. Wilmouth, 34 M.J. 739 (N.M.C.M.R. 1991).

E. **Espionage as a Capital Offense.**

1. Accused must commit offense of espionage or attempted espionage; and

2. The offense must concern:

a. Nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense retaliation against large scale attack;

b. War plans;

c. Communications intelligence or cryptographic information; or

d. Major weapons system or major elements of defense strategy. MCM, 1984, Part IV, para. 30b(3).

F. **Recent Espionage Cases.**

1. United States v. Richardson, 33 M.J. 127 (C.M.A. 1991) (case reversed because MJ erred in instructing panel that intent requirement for offense of attempted espionage would be satisfied if accused acted in bad faith "or otherwise without authority" in disseminating information).

2. United States v. Peri, 33 M.J. 927 (A.C.M.R. 1993) (accused's conscious, voluntary act of conveying defense information across the East German border and then intentionally delivering himself and the information into custody and control of East German authorities constituted "delivery," as required to prove espionage).

3. United States v. Wilmoth, 34 M.J. 739 (N.M.C.M.R. 1991) (Art. 106a includes both espionage and attempted espionage and an essential element of attempted espionage is an act that amounts to more than mere preparation).

4. United States v. Schoof, 37 M.J. 96 (C.M.A. 1993) (accused's actions in enlisting aid of fellow sailor en route to delivering material to foreign embassy, removing classified documents from ship's storage facility and converting them to his own personal possession, and traveling halfway to embassy to deliver went beyond "mere preparation" and guilty plea to charge of attempted espionage was provident).

5. United States v. Sombolay, 37 M.J. 647 (A.C.M.R. 1993) (to be convicted of espionage, information or documents passed by accused need not be of the type requiring a security classification, but gravamen of offense is the mens rea with which accused has acted, not impact or effect of act itself, i.e., did accused intend to harm the United States or have reason to believe that his conduct would harm the United States).

CHAPTER 4

SUBSTANTIVE CRIMES

I. OFFENSES AGAINST THE PERSON.

A. Assault And Battery. UCMJ art. 128.

Introduction. Under the UCMJ, assault is defined as an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated. An assault can therefore be committed in one of three separate ways: by offer, by attempt, or by battery. UCMJ art. 128.

B. Assault by Offer. An act or omission which foreseeably puts another in reasonable apprehension that force will immediately be applied to his person is an assault by offer provided the act or omission involved is either intentional or culpably negligent. The gravamen of this offense is the placing of the victim in reasonable apprehension of an immediate unlawful touching of his person. The fact that the offered touching cannot actually be accomplished is no defense provided the putative victim is placed in reasonable apprehension. MCM, 1984, Part IV, para. 54c.

1. The offer.

a. The ability to inflict injury need not be real but only reasonably apparent to the victim. For example, pointing an unloaded pistol at another in jest constitutes an assault by intentional offer if the victim is aware of the attack and is placed in reasonable apprehension of bodily injury. United States v. Bush, 47 C.M.R. 532 (N.C.M.R. 1973).

b. The victim's belief that the accused does not intend to inflict injury vitiates the offense under the theory of offer. United States v. Norton, 4 C.M.R. 3 (C.M.A. 1952).

c. The victim's apprehension of impending harm must be reasonable. See United States v. Hernandez, 44 C.M.R. 500 (A.C.M.R. 1971).

d. Mere words or threats of future violence are insufficient to constitute an assault. In United State v. Hines, 21 C.M.R. 201 (C.M.A. 1956), the court held that working the bolt of a loaded weapon so that it was ready for instant firing, coupled with a statement indicating a present intent to use the weapon, was more than mere preparation and constituted an act of assault.

e. An accused who tries but fails to offer violence to frighten a victim may be guilty of an attempt to commit an assault by offer under UCMJ art. 80. United States v. Locke, 16 M.J. 673 (A.C.M.R. 1983).

2. The culpably negligent offer. Culpable negligence is defined in MCM, 1984, Part IV, para. 44c as a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. United States v. Pittman, 42 C.M.R. 720 (A.C.M.R. 1970). The absence of an intent to do bodily harm is not a defense. United States v. Redding, 34 C.M.R. 22 (C.M.A. 1963). An example of such an assault would be a situation wherein the accused knowingly conducts rifle target practice in a built up area and thus frightens innocent bystanders into a reasonable belief of imminent injury.

C. Assault by Attempt. An overt act which amounts to more than mere preparation and is done with apparent present ability and with the specific intent to do bodily harm constitutes an assault by attempt. MCM, 1984, Part IV, para. 54c.

1. More than mere preparation to inflict harm is required. United States v. Crocker, 35 C.M.R. 725 (A.F.B.R. 165) ("Where the accused with open knife advances towards his victim at the time when an affray is impending or is in progress and comes within striking distance, this amounts to more than mere preparation and is sufficient to complete the offense.").

2. An apparent ability to inflict bodily harm must exist.

a. United States v. Hernandez, 44 C.M.R. 500 (A.C.M.R. 1971). No offense where Government failed to prove that instrument used under the circumstances was likely to result in harm.

b. United States v. Smith, 15 C.M.R. 41 (C.M.A. 1954). Accused need not be within actual striking distance of victim to constitute apparent ability to inflict harm.

3. Victim's perception of impending harm is unnecessary. MCM, 1984, Part IV, para. 54c(1)(b)(i).

4. Intent. Prior to the 1984 Manual an attempt under UCMJ art. 128 required only a general intent. United States v. Pittman, 42 C.M.R. 720 (A.C.M.R. 1970); United States v. Hand, 46 C.M.R. 440 (A.C.M.R. 1972). In MCM, 1984, Part IV, para. 54c the attempt theory was described to require a specific intent. As the President's authority does not embody legislative authority to define crimes, the validity of this additional requirement

must be judicially determined. See generally United States v. Johnson, 17 M.J. 252 (C.M.A. 1984); United States v. Margelony, 33 C.M.R. 267 (C.M.A. 1963).

5. Applications.

a. United States v. Hines, 21 C.M.R. 201 (C.M.A. 1956). Words alone, or threats of future harm, are insufficient.

b. United States v. Davis, 49 C.M.R. 463 (A.C.M.R. 1974). Intentionally firing pistol over the heads of victims insufficient for assault by attempt.

D. Battery. An intentional or culpably negligent application of force or violence to the person of another by a material agency constitutes a battery.

1. Bodily harm.

a. Any offensive touching will suffice. See United States v. Bonano-Torres, 29 M.J. 845 (A.C.M.R. 1989), aff'd, 31 M.J. 175 (C.M.A. 1990) (nonconsensual kiss and touching buttons on blouse); TJAGSA Practice Note, Battery Without Touching the Victim's Person, The Army Lawyer, Mar. 1991, at 20 (discusses C.M.A. opinion in Bonano-Torres); TJAGSA Practice Note, The Scope of Assault, The Army Lawyer, Apr. 1990, at 67 (discusses the A.C.M.R. opinion in Bonano-Torres); United States v. Van Beek, 47 C.M.R. 99 (A.C.M.R. 1973); cf. United States v. Winkler, 5 M.J. 835 (A.C.M.R. 1978) (parental privilege to discipline).

b. Consent will not always be a defense. United States v. Dumford, 28 M.J. 836 (A.F.C.M.R. 1989) (consent not a defense to assault for sexual activity where the accused has the AIDS virus), aff'd, 30 M.J. 137 (C.M.A. 1990); United States v. Brantner, 28 M.J. 941 (N.M.C.M.R. 1989) (consent not a defense to assault by using unsterilized needles); United States v. O'Neal, 36 C.M.R. 189 (C.M.A. 1966) (both parties to a mutual affray are guilty of assault); United States v. Holmes, 24 C.M.R. 762 (A.F.B.R.) (consent not a defense if the injury more than trifling or there is a breach of public order); cf. United States v. Rath, 27 M.J. 600 (A.C.M.R. 1988) (child may consent to some types of assault).

c. Certain persons may be justified in touching others even without their permission. See, e.g., United States v. McDaniel, 7 M.J. 522 (A.C.M.R. 1979) (no assault for NCO to place drunk and protesting soldier in a cold shower to sober him up); United States v. Schiefer, 28 C.M.R. 417 (A.B.R. 1958) and United States v. Winkler, 5 M.J. 835 (a.C.M.R. 1978) (parental discipline).

2. Unlawful touching must be result of an intentional or culpably negligent act. See United States v. Turner, 11 M.J. 784 (A.C.M.R. 1981), wherein the court contrasts an intentional battery with a culpably negligent battery. There the court agreed that the accused who threw a rake at an MP, hitting him on the arm, had in fact committed a battery, but it split on whether the violent act was intentional or culpably negligent.

3. Multiplicity. Force alleged in attempted robbery was same as force in assault and battery charge and therefore charges were multiplicious for findings. United States v. McMilhan, 32 M.J. 257 (C.M.A. 1991.)

E. Aggravated Assault With a Dangerous Means, Weapon or Force. UCMJ art. 128(b)(1).

1. Requires an assault or battery; i.e., a theory of simple assault.

2. The means/force/weapon is dangerous when used in a manner likely to produce grievous bodily harm. United States v. Hernandez, 44 C.M.R. 500 (C.M.A. 1971) (claymore mine, under the circumstances, not used as a dangerous weapon). The offense is not established by the subjective state of mind of the victim but by an objective test as to whether the weapon is used as a dangerous weapon. United States v. Cato, 17 M.J. 1108 (A.C.M.R. 1984).

a. Firearms. Traditional analysis has held that a firearm is not dangerous if it is not loaded or functional. See United v. Reid, 42 C.M.R. 573 (A.C.M.R. 1970) (unloaded rifle not a dangerous weapon); United States v. Smith, 2 C.M.R. 256 (A.B.R. 1951) (pistol as bludgeon is a dangerous weapon); United States v. Lamp, 44 C.M.R. 504 (A.C.M.R. 1971) (functional carbine with rounds in magazine but not chamber a dangerous weapon); United States v. Cato, 17 M.J. 1108 (A.C.M.R. 1984) (jammed rifle a dangerous weapon). More recent decisional authority says a firearm is dangerous regardless of whether it is loaded or functional United States v. Sullivan, 36 M.J. 574 (A.C.M.R. 1992).

b. Fists. United States v. Keene, 50 C.M.R. 217 (A.C.M.R. 1975); United States v. Saunders, 25 C.M.R. 89 (C.M.R. 1958); United States v. Vigil, 13 C.M.R. 30 (C.M.A. 1953); United States v. Whitfield, 35 M.J. 535 (A.C.M.R. 1992); United States v. Debaugh, 35 M.J. 548 (A.C.M.R. 1992).

c. Belt buckle. United States v. Patterson, 21 C.M.R. 135 (C.M.A. 1956).

d. Beer bottle. United States v. Straub, 30 C.M.R. 156 (C.M.A. 1961).

e. Butter knife. United States v. Lewis, 34 C.M.R. 980 (A.B.R. 1964).

f. Stick. United States v. Ealy, 39 C.M.R. 313 (A.B.R. 1967).

g. CS/riot grenade. United States v. Aubert, 46 C.M.R. 848 (A.C.M.R. 1972); United States v. Schroeder, 42 C.M.R. 430 (A.C.M.R. 1973).

h. AIDS (HIV) virus. United States v. Johnson, 30 M.J. 53 (C.M.A. 1990); United States v. Stewart, 29 M.J. 92 (C.M.A. 1989); United States v. Joseph, 37 M.J. 392 (C.M.A. 1993); see generally TJAGSA Practice Note, AIDS and Aggravated Assault, The Army Lawyer, Jul. 1990, at 47 (discusses Johnson); TJAGSA Practice Note, Court of Military Appeals Decides AIDS-Related Cases, The Army Lawyer, Dec. 1989, at 32, 34 (discusses Stewart); but see, United States v. Perez, 33 M.J. 1050 (A.C.M.R. 1991) (unprotected sexual intercourse by HIV infected soldier did not constitute an assault by battery where the evidence was that the accused's vasectomy prevented transfer of the virus); see TJAGSA Practice Note, Aids and Adultery, The Army Lawyer, Apr 1993, at 16 (discusses Perez); United States v. Schoolfield, 36 M.J. 545 (A.C.M.R. 1992).

i. Tent pole. United States v. Winston, 27 M.J. 618 (A.C.M.R. 1988).

j. Bed extender. United States v. Wilson, 26 M.J. 10 (C.M.A. 1988).

k. Unsterilized needle. United States v. Brantner, 28 M.J. 941 (N.M.C.M.R. 1989).

3. Under UCMJ art. 134, a person can be convicted for carrying a concealed weapon provided it is shown that the weapon was "dangerous." United States v. Thompson, 14 C.M.R. 38 (C.M.A. 1954). The term "dangerous weapon" has a different meaning in connection with this offense than it does in connection with the offense of aggravated assault. Under UCMJ art. 134, the term "dangerous weapon" includes an unloaded pistol. United States v. Ramsey, 18 C.M.R. 588 (A.F.B.R. 1954); United States v. Brungs, 14 C.M.R. 851 (A.F.B.R. 1954).

4. Grievous bodily harm is defined as serious bodily injury such as broken bones and deep cuts. MCM, 1984, Part IV, para. 54c.

5. Aggravated assault with a dangerous weapon, means, or force includes the assault theories of offer, attempt, and battery. See UCMJ art. 128. Prior to the 1984 Manual, none of these theories of assault required a specific intent. In MCM,

1984, Part IV, para. 54c the attempt theory of assault was explained as requiring a specific intent. If this explanation is judicially accepted, the attempt theory of aggravated assault with a dangerous weapon, means, or force will require specific intent. See generally United States v. Johnson, 17 M.J. 262 (C.M.A. 1984); United States v. Margelony, 33 C.M.R. 264 (C.M.A. 1963).

6. An assault and threat which occur at the same time are multiplicious for sentencing. United States v. Morris, 41 C.M.R. 731 (A.C.M.R. 1970); United States v. Metcalf, 41 C.M.R. 574 (A.C.M.R. 1969).

F. Aggravated Assault By Intentionally Inflicting Grievous Bodily Harm. UCMJ art. 128(b)(2).

1. Requires non-negligent battery resulting in grievous bodily harm.

2. Specific intent to inflict grievous bodily harm is necessary. United States v. Graves, 10 C.M.R. 39 (C.M.A. 1953) (error not to instruct on defense of intoxication).

G. Assault Versus Communication of Threat. An assault (UCMJ art. 128) is an attempt or offer to do bodily harm with unlawful force or violence. Communication of a threat (UCMJ art. 134) embraces a declaration or intent to do bodily harm. Both offenses therefore relate to infliction of physical injury. When committed simultaneously upon the same victim, they are properly a single offense for punishment purposes. United States v. Lockett, 7 M.J. 753 (A.C.M.R. 1979); United States v. Morris, 41 C.M.R. 731 (A.C.M.R. 1970); United States v. Conway, 33 C.M.R. 903 (A.F.C.M.R. 1963).

II. HOMICIDES. UCMJ art. 118, 119, 134.

A. Definition And Classification.

1. Definition. A homicide is the killing of one human being by the act, procurement, or omission of another human being. (Black's Law Dictionary).

2. Common Law Classifications. At common law , homicides are classified as justifiable, excusable, or criminal. **Justifiable** homicides are those commanded or authorized by law; they are not punishable. **Excusable** homicides are those in which the killer is to some extent at fault but where circumstances do not justify infliction of full punishment for criminal homicide; i.e., the killing remains criminal but the penalty is reduced. Any killing that is not justifiable or excusable is **criminal** homicide -- either murder, manslaughter, or negligent homicide.

[Clark & Marshall, A Treatise on the Law of Crimes 469-477 (7th ed. 1969)].

B. Causation.

1. Generally. See infra Defenses, chapter 5, section IV.

2. Death From Multiple Causes.

a. United States v. Gomez, 15 M.J. 594 (A.C.M.R. 1982) (adopts two-part time of death standard: either irreversible cessation of circulatory and respiratory functions, or irreversible cessation of total brain functions); see generally Kacyznski, We Find the Accused (Guilty) (Not Guilty) Of Homicide: Towards a New Definition of Death, The Army Lawyer, June 1982, at 1.

b. United States v. Schreiber, 18 C.M.R. 266 (C.M.A. 1955) (accused held responsible for death even if his gunshot wound, following a severe beating of the victim by another, only contributed to the death by causing shock).

c. United States v. Houghton, 32 C.M.R. 3 (C.M.A. 1962) (in child abuse death, contributing to or accelerating the death of the victim sufficient to establish responsibility).

3. The Fragile Victim. If the wound, though not ordinarily fatal, through an idiosyncracy causes the death of the victim, the accused is responsible. United States v. Eddy, 28 C.M.R. 718 (A.B.R. 1958).

4. Physician negligence or improper medical treatment does not excuse the accused unless it constitutes gross negligence or intentional malpractice. United States v. Boquex, 2 C.M.R. 424 (A.B.R. 1952) (death by asphyxiation from aspiration into lungs of blood from facial injuries); United States v. Eddy, 28 C.M.R. 718 (A.B.R. 1958); United States v. Gomez, 15 M.J. 594 (A.C.M.R. 1983).

5. Accused's act need not be the sole cause of death, or the latest/most immediate cause of death. United States v. Romero, 1 M.J. 227 (C.M.A. 1975) (accused guilty of negligent homicide in overdose death after helping victim position syringe); see also United States v. Mazur, 13 M.J. 143 (C.M.A. 1982) (accused guilty of involuntary manslaughter by culpable negligence when assisted victim who could no longer inject self to inject heroin).

6. Accused is responsible if his act caused the victim to kill herself unintentionally or by her negligence. See

United States v. Schatzinger, 9 C.M.R. 586 (N.B.R. 1953).

C. **Premeditated Murder.** UCMJ art. 118(1).

1. Statutory Penalty: death or life imprisonment.

2. Homicide Capital Case Procedures. R.C.M. 1004. (Note, also applicable in appropriate circumstances to UCMJ arts. 82, 85, 90, 94, 99, 100, 101, 102, 104, 106, 110, 113 and 120.) See generally United States v. Matthews, 13 M.J. 501 (A.C.M.R. 1982) (en banc), rev'd as to sentence, 16 M.J. 354 (C.M.A. 1983).

a. Members trial only. UCMJ art. 18.

b. Depositions cannot be used without defense consent. UCMJ art. 49(d).

c. Unanimous concurrence for death sentence; 3/4 concurrence for life sentence.

d. Guilty plea prohibited. UCMJ art. 45b.

e. Convening authority referral as "non-capital" avoids more restrictive procedures in 1 through 4, supra, but mandates life imprisonment in premeditated murder case. United States v. Duffy, 47 C.M.R. 658 (A.C.M.R. 1973).

f. Double counting of aggravated factors is prohibited. Improper double counting of aggravating sentencing factors occurred in double homicide case in which each murder was considered to aggravate other murder and, thus, second aggravating factor for murder had to be set aside. United States v. Curtis, 38 M.J. 530 (N.M.C.M.R. 1993).

3. Intent. Premeditation requires a specific intent to kill and consideration of the act intended to bring about death. The intent to kill need not be entertained for any particular or considerable length of time and the existence of premeditation may be inferred from the circumstances surrounding the killing. MCM, 1984, Part IV, para. 43c(2)(a).

a. Time lapse. United States v. Sechler, 12 C.M.R. 119 (C.M.A. 1953).

b. Intent only to inflict grievous bodily harm is insufficient. United States v. Mitchell, 7 C.M.R. 77 (C.M.A. 1953).

4. Proof of Premeditation. United States v. Matthews, 13 M.J. 501 (A.C.M.R. 1982) (en banc); United States v. Ayers, 34 C.M.R. 116 (C.M.A. 1964) (can be inferred from the viciousness of the assault); United States v. Teeter, 12 M.J. 716

(A.C.M.R. 1981) (number of blows, nature and location of injuries); United States v. Bullock, 10 M.J. 674 (A.C.M.R. 1981) (prior anger and threats against victim); United States v. Shanks, 13 M.J. 783 (A.C.M.R. 1982) (homicidal act part of conspiracy); United States v. Mitchell, 2 M.J. 1020 (A.C.M.R. 1976) (weapon procured before killing); see also United States v. Cooper, 28 M.J. 810 (A.C.M.R. 1989); United States v. Nelson, 28 M.J. 553 (A.C.M.R. 1989); United States v. Curry, 31 M.J. 359 (C.M.A. 1990) (violent shaking of child victim, coupled with the accused's demeanor at hospital, prior abuse of child, and incredible explanation of injuries).

5. Transferred Intent. MCM, 1984, Part IV, para. 43c(2)(b). United States v. Black, 11 C.M.R. 57 (C.M.A. 1953).

6. State of Mind Defenses. All state of mind defenses apply to reduce premeditated murder to unpremeditated murder; however, voluntary intoxication will not reduce premeditated murder below unpremeditated murder. United States v. Ferguson, 38 C.M.R. 239 (C.M.A. 1968).

D. **Unpremeditated Murder.** UCMJ art. 118(2).

1. Statutory Penalty: life imprisonment or less.

2. Nature of Act. The offense can be based on an act or omission to act where there is a duty to act; United States v. Valdez, 35 M.J. 555 (A.C.M.R. 1992) (parent's deliberate failure to provide medical and other care to his child which resulted in death of child supported charge of murder).

3. Intent. Accused must have either a specific intent to kill or inflict great bodily harm.

a. All state of mind defenses apply except voluntary intoxication. MCM, 1984, Part IV, para. 43c(2)(c); United States v. Trower, 2 M.J. 492 (A.C.M.R. 1976); United States v. Morgan, 37 M.J. 407 (C.M.A. 1993).

b. Voluntary intoxication cannot defeat capacity of accused to entertain intent to kill or inflict great bodily harm involved in unpremeditated murder; one who voluntarily intoxicates himself or herself cannot be heard to complain of being incapable, by virtue of that intoxication, of intentionally committing acts leading to death of another person. United States v. Morgan, 37 M.J. 407 (C.M.A. 1993).

c. Heat of passion defense reduces unpremeditated murder to voluntary manslaughter.

d. Objective requirements.

(1) Adequate provocation so as to excite uncontrollable passion in a reasonable man.

(2) Not sought, not induced.

(3) Unspent at moment killing occurs.

e. Subjective requirements. The accused must in fact have been acting under such a heat of passion, fear, or rage. See United States v. Staten, 6 M.J. 275 (C.M.A. 1979); United States v. Jackson, 6 M.J. 261 (C.M.A. 1979).

f. Reduces murder to voluntary manslaughter only.

(1) United States v. Bellamy, 36 C.M.R. 115 (C.M.A. 1966) (insufficient cooling time).

(2) United States v. Stark, 17 M.J. 519 (A.C.M.R. 1984) (insulting and taunting remarks are inadequate provocation).

g. The inference of intent. A permissive inference is recognized that person intends the natural and probable consequences of an act purposely done by him. United States v. Owens, 21 M.J. 117 (C.M.A. 1985); United States v. Varraso, 21 M.J. 129 (C.M.A. 1985); see United States v. Wilson, 26 M.J. 10 (C.M.A. 1988).

E. Murder While Doing An Inherently Dangerous Act. UCMJ art. 118(3).

1. In General. Alternative theory to unpremeditated murder.

2. Intent. Article 118(3) is not a specific intent offense, but

a. The accused must have known that the result of his act would be death or great bodily harm, United States v. Berg, 30 M.J. 195 (C.M.A.), affirmed on reconsideration, 31 M.J. 38 (C.M.A. 1990), and

b. The death-causing act was intentional, United States v. Hartley, 36 C.M.R. 405 (C.M.A. 1966), and

c. The act evidences wanton heedlessness of death or great bodily harm. MCM, 1984, Part IV, para. 43c(4)(a).

3. Nature of Act. The conduct of the accused must be inherently dangerous to another, i.e., at least one other person. This is a change in the law since United States v. Berg, 31 M.J.

38 (C.M.A. 1990) which required the accused's conduct to endanger more than one other person. See DoD Auth. Act of 1993, dated 23 Oct 1992 which amended art. 118(3), UCMJ.

4. Malice Requirement. For a discussion of the malice required, see United States v. Vandenack, 15 M.J. 230 (C.M.A. 1983).

5. Effect of Intoxication. Intoxication is no defense.

6. Examples of Inherently Dangerous Conduct.

a. United States v. Hartley, 36 C.M.R. 405 (C.M.A. 1966) (shooting into a crowded room).

b. United States v. Judd, 27 C.M.R. 187 (C.M.A. 1959) (shooting into a house trailer with two others present).

c. United States v. Vandenack, 15 M.J. 230 (C.M.A. 1983) (speeding and intentionally running red light after a prior accident).

F. Felony Murder. UCMJ art. 118(4).

1. Statutory Penalty: death or life imprisonment.

2. In General. Homicide must be committed during the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson. United States v. Jefferson, 22 M.J. 315 (C.M.A. 1986).

3. Intent. No specific intent required, except that of underlying felony. United States v. Hamer, 12 M.J. 898 (A.C.M.R. 1982).

4. Causation. Causal relationship between felony and death must be established. United States v. Borner, 12 C.M.R. 62 (C.M.A. 1953).

5. Multiplicity. Felony murder is multiplicious with premeditated murder, United States v. Teeter, 16 M.J. 68 (C.M.A. 1983), and with unpremeditated murder. United States v. Hubbard, 28 M.J. 27 (C.M.A. 1989).

6. Capital Punishment.

a. In Edmund v. Florida, 458 U.S. 782 (1982), the Supreme Court held that to impose the death penalty for felony murder the accused must have killed or have had the intent to kill. R.C.M. 1004(c)(8) allows the death penalty only if the accused was the actual perpetrator of the killing.

b. Accused's pleas of guilty to unpremeditated murder and robbery by means of force and violence were, in context, pleas to the capital offense of felony murder. United States v. Dock, 28 M.J. 117 (C.M.A. 1989).

7. Instructions. Where members could have reasonably found that accused formed the intent to steal from victim either prior to the infliction of the death blows or after rendering him helpless, he was not entitled to an instruction that, to be convicted of felony-murder he had to have the intent to commit the felony at the time of the actions which caused the killing. United States v. Fell, 33 M.J. 628 (A.C.M.R. 1991).

G. Attempted Murder. UCMJ art. 80. Attempted murder requires a specific intent to kill. Although a service member may be convicted of murder if he commits homicide without an intent to kill, but with an intent to inflict great bodily harm (UCMJ art. 118(2)) or while engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life (UCMJ art. 118(3)), those states of mind will not suffice to establish attempted murder. United States v. Roa, 12 M.J. 210 (C.M.A. 1982).

H. Voluntary Manslaughter. UCMJ art. 119(a).

1. Defined. An unlawful killing done with an intent to kill or inflict great bodily harm but done in the heat of sudden passion caused by adequate provocation.

a. Provocation must be sufficient to excite uncontrollable passion in the mind of a reasonable person. The rage must continue throughout the attack. United States v. Seeloff, 15 M.J. 978 (A.C.M.R. 1983). Adequate provocation is an objective concept. Id.

b. Insulting, abusing, teasing, or taunting remarks do not constitute adequate provocation to reduce murder to voluntary manslaughter. United States v. Stark, 19 M.J. 519 (A.C.M.R. 1984).

2. Attempted Voluntary Manslaughter. The offenses of attempted voluntary manslaughter and assault with intent to commit voluntary manslaughter require a showing of accused's specific intent to kill. A showing only of a specific intent to inflict great bodily harm will be insufficient to establish these offenses. United States v. Barnes, 15 M.J. 121 (C.M.A. 1983).

I. Involuntary Manslaughter Resulting From A Culpably Negligent Act. UCMJ art. 119(b)(1).

1. Intent. No specific intent is required.

2. Standard of Culpability: culpable negligence. MCM, 1984, Part IV, para. 44c(2).

a. Drug overdose death of another. United States v. Henderson, 23 M.J. 77 (C.M.A. 1986) (providing drug, encouraging use, providing private room, presence); United States v. Uno, 47 C.M.R. 683 (A.C.M.R. 1973) (injection by needle for drug use); United States v. Mazur, 8 M.J. 513 (A.C.M.R. 1979) (assisting fellow soldier to inject heroin into his vein), aff'd, 13 M.J. 143 (C.M.A. 1982); see also United States v. Dinkel, 13 M.J. 400 (C.M.A. 1982); see generally Milhizer, Involuntary Manslaughter and Drug Overdose Death: A Proposed Methodology, The Army Lawyer, Mar. 1989, at 10.

b. Child abuse. United States v. Brown, 26 M.J. 148 (C.M.A. 1988); United States v. Baker, 24 M.J. 354 (C.M.A. 1987); United States v. Mitchell, 12 M.J. 1015 (A.C.M.R. 1982).

c. Giving car keys to a drunk. United States v. Brown, 22 M.J. 448 (C.M.A. 1986).

d. Failing to follow safety rules and driving after brakes failed. United States v. Cherry, 22 M.J. 284 (C.M.A. 1986).

e. Culpably negligent surgical procedures. United States v. Ansari, 15 M.J. 812 (N.M.C.M.R. 1983); but see United States v. Billig, 26 M.J. 744 (N.M.C.M.R. 1988).

3. Effect of Contributory Negligence. The deceased's or a third party's contributory negligence may exonerate the accused if it "looms so large" in comparison with the accused's negligence that the accused's negligence is no longer a substantial factor in the final result. United States v. Cooke, 18 M.J. 152 (C.M.A. 1984).

4. Pleading. When charged under a culpable negligence theory, an involuntary manslaughter specification must allege that death was a reasonably foreseeable consequence of the accused's misconduct. United States v. McGhee, 29 M.J. 840 (A.C.M.R. 1989); see generally TJAGSA Practice Note, The Scope of Assault, The Army Lawyer, Apr. 1990, Oct. 67, 68-70 (discusses McGhee).

J. Involuntary Manslaughter While Perpetrating An Offense Directly Affecting The Person Of Another. UCMJ art. 119(b)(2).

1. Assault. United States v. Jones, 30 M.J. 127 (C.M.A. 1990); United States v. Wilson, 26 M.J. 10 (C.M.A. 1988); United States v. Madison, 34 C.M.R. 435 (C.M.A. 1964); see generally TJAGSA Practice Note, Involuntary Manslaughter Based Upon an Assault, The Army Lawyer, Aug. 1990, at 32 (discusses

Jones).

2. Drug Overdose Death of Another. United States v. Sargent, 18 M.J. 331 (C.M.A. 1984) (mere sale of drugs is not an offense "directly affecting the person of another"); see also United States v. Dillon, 18 M.J. 340 (C.M.A. 1984); see generally Milhizer, Involuntary Manslaughter and Drug-Overdose Deaths: A Proposed Methodology, The Army Lawyer, Mar. 1989, at 10.

K. Negligent Homicide. UCMJ art. 134.

1. Intent. No specific intent is required.

2. Simple Negligence Standard.

a. United States v. Spicer, 20 M.J. 188 (C.M.A. 1985), and United States v. Romero, 1 M.J. 227 (C.M.A. 1975) (conviction affirmed where accused helped another "shoot up" with heroin, resulting in that person's death by overdose.)

b. United States v. Greenfeather, 32 C.M.R. 151 (C.M.A. 1962) (vehicle homicide).

c. United States v. Cuthbertson, 46 C.M.R. 977 (A.C.M.R. 1972) (aircraft homicide).

d. United States v. Zukrigl, 15 M.J. 798 (A.C.M.R. 1983) (failure to check on safety measures for a water crossing exercise).

e. United States v. Perez, 15 M.J. 585 (A.C.M.R. 1985) negligently entrusting child to a babysitter who had a history of assaulting the child).

f. United States v. Gordon, 31 M.J. 30 (C.M.A. 1990) (horseplay on a rowboat with a nonswimmer); see generally TJAGSA Practice Note, Negligent Homicide and a Military Nexus, The Army Lawyer, Mar. 1991, at 28 (discusses Gordon).

g. United States v. Billig, 26 M.J. 744 (N.M.C.M.R. 1988) (offense may not be available for negligent surgical procedures).

h. United States v. Kick, 7 M.J. 82 (C.M.A. 1979) (As a matter of substantive law, the offense of negligent homicide is a proper basis for criminal liability. Furthermore, it has not been preempted by other specified punitive articles, i.e., UCMJ arts. 118 and 119.)

i. Res ipsa loquitur is not accepted in military criminal law. United States v. Ryan, 14 C.M.R. 153 (C.M.A. 1954); United States v. Bryan, 41 C.M.R. 184 (C.M.A. 1970);

United States v. Thomas, 11 M.J. 315, 317 n. 2 (C.M.A. 1982).

j. United States v. Robertson, 37 M.J. 432 (C.M.A. 1993). (Evidence of accused's negligence in connection with treatment of son's eating disorder was insufficient as a matter of law to support accused's conviction of negligent homicide in connection with the death of the accused's 15 year-old anorexic/bulimic son).

3. Proximate Cause. The negligence must be the proximate cause of the death. Although proximate cause does not mean sole cause, it does mean a material and foreseeable cause. United States v. Perez, 15 M.J. 585 (A.C.M.R. 1983) (death of child foreseeable where mother left child with boyfriend who had twice previously seriously injured child).

4. Relation to Involuntary Manslaughter. Negligent homicide is a lesser included offense of involuntary manslaughter. United States v. McGhee, 32 M.J. 322 (C.M.A. 1991).

III. **KIDNAPPING.** UCMJ art 134.

A. Introduction. Wharton's Criminal Law defines common law kidnapping as the forcible abduction or stealing of a person and sending him into another country. It was an aggravated form of false imprisonment, since it included not only the elements of that offense, but also the element of carrying the victim out of his own country and beyond the protection of its laws. Military courts also treat kidnapping, for the most part, as an aggravated form of false imprisonment.

B. Theories Of Prosecution. Kidnapping may be tried by a court-martial on one of three theories. If the misconduct occurred in an area over which the United States exercises exclusive or concurrent jurisdiction, the accused may be charged with violating state penal law as incorporated into federal law by the Assimilative Crimes Act, 18 USC § 13 -- which, in turn, is incorporated into military law under the third clause of Article 134. Secondly, if it meets the jurisdictional requirements of the Federal Kidnapping Act, 18 USC § 1201 -- which also is incorporated into military law by the third clause of Article 134 -- the crime may be prosecuted under that statute. Finally, kidnapping may be charged as conduct which is service-discrediting or contrary to good order and discipline, in violation of Article 134. United States v. Jeffress, 28 M.J. 409 (C.M.A. 1989).

C. Elements. MCM, 1984, Part IV, Para. 92b.

1. That the accused seized, confined, inveigled,

decoyed, or carried away a certain person.

2. That the accused then held such person against that person's will;

3. That the accused did so willfully and wrongfully; and

4. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

D. Nature Of Detention. In order to convict accused of kidnapping, there must be more than "incidental" detention as determined by whether there was occurrence of confinement or carrying away and holding for a period of time, length of duration, whether actions occurred during commission of separate offense, character of separate offense, whether detention or asportation exceeded that which was inherent in the separate offense, and whether there was any additional risk to victim beyond that inherent in commission of offense. United States v. Barnes, 38 M.J. 72 (C.M.A. 1993).

E. Recent Cases.

1. United States v. Jeffress, 28 M.J. 409 (C.M.A. 1989) (guilty plea to kidnapping was affirmed, even though detention of victim consisted of moving her some 15 feet; she was moved from traveled area into greater darkness, there was increased risk of harm to the victim, and dragging victim away from beaten path was not inherent in offense of forcible sodomy).

2. United States v. Blocker, 32 M.J. 281 (C.M.A. 1991) (kidnapping conviction affirmed where accused "inveigled" 17 year-old victim to remain in car when he drove off highway and down dirt hiking path before raping her).

3. United States v. Mathai, 34 M.J. 33 (C.M.A. 1992) (NCO "inveigled" victim into his office by stating, "Follow me, Private" following which accused prevented her from leaving the room several times and held her against her will).

4. United States v. Broussard, 35 M.J. 665 (A.C.M.R. 1992) (accused was properly convicted of kidnapping where he grabbed his wife from behind, dragged her into the bedroom, bound her arms and legs to furniture, and held her for a sufficient period of time before committing various sex crimes upon her).

5. United States v. Caruthers, 37 M.J. 1006 (A.C.M.R. 1993) (accused's asportation and holding of his wife were more than "incidental" as required for offense of kidnapping; accused

conceded his wife was seized or held when she was grabbed from behind, gagged, tied and dragged short distance away where she was held for two to three-hour period during commission of sexual assaults).

6. United States v. Barnes, 38 M.J. 72 (C.M.A. 1993) (for purposes of convicting accused of kidnapping, evidence that victim was locked in room and detained for over two hours against her will was showing of more than de minimus detention).

IV. **MAIMING.** UCMJ art. 124.

A. Introduction. Maiming is a non-negligent battery which:

1. Disfigures by mutilation, or

2. Destroys or disables an organ, or

3. Seriously diminishes the victim's physical vigor.

B. Nature Of Offense. It is maiming to put out a person's eye, to cut off a hand, foot, or finger, or to knock out a tooth, as these injuries destroy or disable those members or organs. It is also maiming to injure an internal organ so as to seriously diminish the physical vigor of a person. Likewise, it is maiming to cut off an ear or scar a face with acid, as these injuries seriously disfigure a person. A disfigurement need not mutilate any entire member to come within this article, or be of any particular type, but must be such as to impair perceptibly and materially the victim's comeliness. The disfigurement, diminishment of vigor, or destruction or disablement of any member or organ must be a serious injury of a substantially permanent nature. However, the offense is complete if such an injury is inflicted even though there is a possibility that the victim may eventually recover the use of the member or organ, or that the disfigurement may be cured by surgery. MCM, 1984, Part IV, para. 50c(1).

C. Intent. The 1969 Manual described maiming as a general intent crime. MCM, 1969, para. 203. This interpretation was based on United States v. Hicks, 20 C.M.R. 337 (C.M.A. 1956). See also United States v. Tua, 4 M.J. 761 (A.C.M.R. 1977). The 1984 Manual, however, also relying on Hicks, describes maiming as requiring a specific intent to injure generally. MCM, 1984, Part IV, para. 50c (Analysis). The correct interpretation of the statute is a matter for judicial determination. United States v. Margelony, 33 C.M.R. 267 (C.M.A. 1963).

D. Injury. Where the scars to the victim's face and body, predominately on the buttocks, were not easily detectable to the casual observer, the injury was insufficient to support a maiming charge. United States v. McGhee, 29 M.J. 840 (A.C.M.R. 1989).

E. Defenses. If the injury is done under circumstances which would justify or excuse homicide, the offense of maiming is not committed. MCM, 1984, Part IV, para. 50c(4). See also, R.C.M. 916.

V. SEXUAL OFFENSES.

A. Rape. UCMJ art. 120(a).

1. Introduction. Rape is defined as an accused's act of sexual intercourse perpetrated by force and without the victim's consent.

2. Lesser Included Offenses.

a. Carnal knowledge. Change 6 to the 1984 Manual, dated 29 December 1993, amends Part IV, para. 45d(1) to reflect that carnal knowledge is a lesser included offense of rape where the pleading alleges that the victim has not yet attained the age of 16 years.

b. Indecent acts with another. Only non-consensual indecent acts with another are lesser included offenses to a short-form rape specification. United States v. King, 29 M.J. 901 (A.C.M.R. 1989); United States v. Watts, 19 M.J. 703 (N.M.C.M.R. 1984); see also United States v. Cheatham, 18 M.J. 721 (A.F.C.M.R. 1984).

3. No Specific Intent Required. United States v. Pugh, 9 C.M.R. 536 (A.B.R. 1953) (voluntary intoxication not a defense).

4. The Would-Be Seductor. A gross and atrocious attempt to persuade the victim to consent to intercourse is not attempted rape but may be indecent assault. United States v. Polk, 48 C.M.R. 993 (A.F.C.M.R. 1974).

5. The Indecisive Rapist. Accused who was dissuaded by the victim from completing the rape and abandoned the act could be found guilty of attempted rape. United States v. Valenzuela, 15 M.J. 699 (A.C.M.R. 1983); but see United States v. Byrd, 24 M.J. 286 (C.M.A. 1987) (Everett, C.J.) (voluntary abandonment must be recognized as a defense to attempt).

6. Any Penetration Is Sufficient. UCMJ art. 120; United States v. Aleman, 2 C.M.R. 269 (A.B.R. 1951).

7. Lack Of Consent As An Element.

a. "Without her consent" is equivalent to "against her will." United States v. Short, 16 C.M.R. 11 (C.M.A. 1954).

b. A child of tender years is incapable of consent. United States v. Aleman, 2 C.M.R. 269 (A.B.R. 1951); United States v. Thompson, 3 M.J. 168 (C.M.A. 1977); see United States v. Huff, 4 M.J. 816 (A.C.M.R. 1978) (because victim is under 16, proof of age is proof of nonconsent allowing fresh complaint evidence).

c. No consent exists where victim is incompetent, unconscious, or sleeping. United States v. Booker, 25 M.J. 114 (C.M.A. 1987); United States v. Robertson, 33 C.M.R. 828 (A.F.B.R. 1963); United States v. Maithai, 34 M.J. 33 (C.M.A. 1992).

d. Competent victim must have evidenced more than lack of acquiescence. United States v. Bonano-Torres, 29 M.J. 845 (A.C.M.R. 1989) (acquiescence to intercourse with accused so the "victim" could go to sleep is insufficient for rape). Resistance appropriate to the circumstances, though not to the limits of her capacity, is required or consent may be inferred. United States v. Henderson, 15 C.M.R. 268 (C.M.A. 1954); see also United States v. Moore, 15 M.J. 354 (C.M.A. 1983); see generally United States v. Steward, 18 M.J. 506, 509-13 (A.F.C.M.R. 1984) (Miller, J., concurring).

e. Proof of rape of a daughter by her father may not require physical resistance if intercourse is accomplished under long, continued parental duress. United States v. Dejonge, 16 M.J. 974 (A.F.C.M.R. 1983); see United States v. Palmer, 29 M.J. 929 (A.F.C.M.R. 1989), aff'd 33 M.J. 7 (C.M.A. 1991); see generally TJAGSA Practice Note, Proving lack of Consent for Intra-Family Sex Crimes, The Army Lawyer, Jun. 1990, at 51.

f. Cooperation with assailant after resistance is overcome by numbers, threats, or fear of great bodily harm is not consent. United States v. Burt, 45 C.M.R. 557 (A.F.C.M.R. 1972); United States v. Evans, 6 M.J. 577 (A.C.M.R. 1978); United States v. Lewis, 6 M.J. 581 (A.C.M.R. 1978).

g. Whether the rape victim was justified in resisting by words alone involves a factual issue whether she viewed physical resistance as impractical or futile. Thus, the military judge erred by instructing that her verbal resistance was sufficient as a matter of law. United States v. Burns, 9 M.J. 706 (N.C.M.R. 1980).

h. An honest and reasonable mistake of fact to the victim's consent is a defense. United States v. Taylor, 26 M.J. 127 (C.M.A. 1988); United States v. Carr, 18 M.J. 297 (C.M.A. 1984); United States v. Davis, 27 M.J. 543 (A.C.M.R. 1988); see United States v. Smith, 32 M.J. 567 (A.C.M.R. 1991) (evidence insufficient to raise mistake of fact as to consent).

i. Consent obtained by fraud in the inducement (marital status, promise to pay money, or respect sexual partner in the morning) will not support a charge of rape. Consent obtained by fraud in factum (a misrepresentation of act performed or some aspects of identity) can support a rape charge. United States v. Booker, 25 M.J. 114 (C.M.A. 1987).

8. Force.

a. Force can be actual or constructive. Constructive force may consist of express or implied threats of bodily harm. United States v. Bradley, 28 M.J. 197 (C.M.A. 1989) (threat of imprisoning husband); United States v. Hicks, 24 M.J. 3 (C.M.A. 1987); United States v. Palmer, 33 M.J. 7 (C.M.A. 1991) (parental figure can exert a psychological force over child that is a form of constructive force).

b. Force can be subtle and psychological, and need not be overt or physically brutal. United States v. Torres, 27 M.J. 867 (A.F.C.M.R. 1989); United States v. Sargent, 33 M.J. 815 (A.C.M.R. 1991).

c. When constructive force is not at issue and the victim is capable of resisting, more than penetration is required; persistent sexual overtures are not enough. United States v. Bonano-Torres, 31 M.J. 175 (C.M.A. 1990).

d. Evidence insufficient to show requisite force. United States v. King, 32 M.J. 558 (A.C.M.R. 1991).

9. Multiplicity.

a. Rape and aggravated assault were multiplicious for findings. United States v. Sellers, 14 M.J. 211 (C.M.A. 1982) (summary disposition); see United States v. Dirello, 17 M.J. 77 (C.M.A. 1983); United States v. Tyler, 14 M.J. 811 (A.C.M.R. 1982) (rape and simple assault multiplicious).

b. Rape and communication of a threat are multiplicious for findings. United States v. Hollimon, 16 M.J. 164 (C.M.A. 1983).

c. Two rapes of same victim were not multiplicious for any purpose where first rape completely terminated before second rape began. United States v. Ziegler,

14 M.J. 860 (A.C.M.R. 1982); accord United States v. Turner, 17 M.J. 997 (A.C.M.R. 1984).

d. Rape and extortion not multiplicious for findings or sentence. United States v. Hicks, 24 M.J. 3 (C.M.A. 1987).

e. Rape and adultery charges are multiplicious for findings. United States v. Lyons, 33 M.J. 543 (A.C.M.R. 1991). See also United States v. Mathai, 34 M.J. 33 (C.M.A. 1992).

10. Capital Punishment. Although UCMJ art. 120(a) authorizes the death penalty for rape, a plurality of the Supreme Court in Coker v. Georgia, 433 U.S. 584 (1977) held that the death penalty for the rape of an adult woman was cruel and unusual punishment regardless of aggravating circumstances. See generally United States v. Clark, 18 M.J. 775 (N.M.C.M.R. 1984). R.C.M. 1004 limits the death penalty for rape to cases where the victim is under the age of 12 or where the accused maimed or attempted to kill the victim.

B. Carnal Knowledge. UCMJ art. 120(b).

1. Introduction. Carnal knowledge is an act of sexual intercourse under circumstances not amounting to rape, by a person with a female not his wife who has not attained the age of 16 years.

2. Mistaken belief, even if honest and reasonable, as to the victim's age is no defense.

3. Honest and reasonable mistake as to identity of accused's sexual partner does constitute a legal defense. United States v. Adams, 33 M.J. 300 (C.M.A. 1991).

4. The victim is not an "accomplice" for purposes of a witness credibility instruction. United States v. Cameron, 34 C.M.R. 913 (A.F.B.R. 1964).

5. Government may prove that the accused and the prosecutrix were not married without direct evidence on the issue. United States v. Wilhite, 28 M.J. 884 (A.F.C.M.R. 1989).

6. In Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981), the Supreme Court rejected the argument that California's statutory rape law violated equal protection in that it applied only to male perpetrators. The Court ruled that important governmental interests were served by such statutes, i.e., protection of young females from unwanted pregnancies.

7. Carnal knowledge form specification is sufficient even though it does not expressly allege that the accused and his partner were not married. United States v. Osborne, 31 M.J. 842 (N.M.C.M.R. 1990).

C. **Sodomy.** UCMJ art. 125.

1. In General. Sodomy is the engaging in unnatural carnal copulation, either with another person of the same or opposite sex, or with an animal.

2. Constitutionality. UCMJ art. 125's prohibition of "unnatural carnal copulation" is not unconstitutionally vague. United States v. Scoby, 5 M.J. 610 (C.M.A. 1978). That term is defined in MCM, 1984, Part IV, para. 51c: "It is unnatural carnal copulation for a person to take into his or her mouth or anus the sexual organ of another person or of an animal; or to place his or her sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation in any opening of the body of an animal." United States v. Henderson, 34 M.J. 174 (C.M.A. 1992) (article 125 does not violate the constitutional right to privacy and it prohibits without exception, all forms of sodomy; accord US v. Fagg 34 M.J. 179 (C.M.A. 1992).

3. Acts Covered. "Unnatural carnal copulation" includes both fellatio and cunnilingus. United States v. Harris, 8 M.J. 52 (C.M.A. 1979). Some penetration, however, is required. UCMJ art. 125; United States v. Tu, 30 M.J. 557 (A.C.M.R. 1990); United States v. Deland, 16 M.J. 889 (A.C.M.R. 1983). Penetration, however slight, by male genital into orifice of human body except the vagina is sufficient. United States v. Cox, 23 M.J. 808 (N.M.C.M.R. 1986). Specification alleging "licking the genitalia" was not inconsistent with the penetration required for sodomy. United States v. Cox, 18 M.J. 72 (C.M.A. 1984). However, proof of licking, without proof of penetration, is insufficient for guilt. United States v. Milliren, 31 M.J. 664 (A.F.C.M.R. 1990); see generally TJAGSA Practice Note, Sodomy and the Requirement for Penetration, The Army Lawyer, Mar. 1991, at 30 (discusses Milliren).

4. Applications.

a. Consensual acts in private may be prosecuted except, possibly, for those performed within the marital relationship. United States v. Scoby, 5 M.J. 610 (C.M.A. 1978); United States v. Jones, 14 M.J. 1008 (A.C.M.R. 1982); see also Doe v. Commonwealth's Attorney for City of Richmond, 403 F.Supp. 1199 (E.D. Va. 1975), aff'd, 425 U.S. 901 (1976) (upholding Virginia consensual sodomy statute); United States v. Linnear, 16 M.J. 628 (A.F.C.M.R. 1983) (act not in private); United States v.

McFarlin, 19 M.J. 790 (A.C.M.R. 1985) (right of privacy limited by government interest is regulating cadre-trainee relationships); see generally United States v. Rogan, 19 M.J. 646 (A.F.C.M.R. 1984).

b. The defense is entitled to an accomplice instruction when the victim participates voluntarily in the offense. United States v. Goodman, 33 C.M.R. 195 (C.M.A. 1963).

c. Evidence is sufficient to prove forcible sodomy where the child victim submitted under compulsion of parental command. United States v. Edens, 29 M.J. 755 (A.C.M.R. 1989). Evidence of a threat by the accused to impose nonjudicial punishment upon the victim, under the circumstances, was not sufficient to prove forcible sodomy. United States v. Carroway, 30 M.J. 700 (A.C.M.R. 1990).

5. Multiplicity.

a. Attempted rape and forcible sodomy or rape and forcible sodomy arising out of the same transaction are separately punishable. United States v. Dearman, 7 M.J. 713 (A.C.M.R. 1979); accord United States v. Rogan, 19 M.J. 646 (A.F.C.M.R. 1984) (Burglary, rape, and sodomy were all separately punishable offenses since different societal norms were violated in each instance. Burglary is a crime against the habitation, rape an offense against the person, and sodomy an offense against morals); United States v. Rose, 6 M.J. 754 (N.C.M.R. 1978).

b. Different types of sodomy at the same time are multiplicious for sentencing but not for findings. United States v. Langford, 15 M.J. 1090 (A.C.M.R. 1983).

c. Despite unity of time, offenses of sodomy and indecent liberties with a child were separate for findings and sentencing. United States v. Cox, 18 M.J. 72 (C.M.A. 1984).

D. Indecent Assault. MCM, 1984, Part IV, para. 63.

1. Nonconsensual offense, requiring assault or battery. The assault or battery need not be inherently indecent, lewd, or lascivious but may be rendered so by accompanying words and circumstances. United States v. Wilson, 13 M.J. 247 (C.M.A. 1982).

2. Requires accused's specific intent to gratify his lust or sexual desires. United States v. Jackson, 31 C.M.R. 738 (A.B.R. 1962); see also United States v. Birch, 13 M.J. 847 (C.G.C.M.R. 1982) (kissing victim against her will without evidence of specific intent to gratify lust or sexual desires was only a battery).

3. Intent. Evidence established specific intent of accused, medical corpsman, to gratify his lust or sexual desires when he inserted his finger into anus of female patients after examination by physicians. United States v, Arviso, 32 M.J. 616 (A.C.M.R. 1991).

4. Can be committed by a male on a woman not his spouse or by a female on a male not her spouse. United States v. Johnson, 17 M.J. 251 (C.M.A. 1984).

5. An accused can be found guilty of indecent assault and not guilty of rape even though both the victim and the accused acknowledge that intercourse occurred. United States v. Watson, 31 M.J. 49 (C.M.A. 1990); United States v. Wilson, 13 M.J. 247 (C.M.A. 1982).

6. Lack of consent. Unlike rape, mere lack of acquiescence is sufficient lack of consent for indecent assault. Actual resistance is not required.

E. Assault With Intent to Commit Rape, Sodomy, or Specified Felony. UCMJ art. 134.

1. A specific intent offense. United States v. Rozema, 33 C.M.R. 694 (A.F.B.R. 1963). An intent to seduce is not a defense to an assault with intent to commit consensual sodomy. United States v. Davis, 15 M.J. 567 (A.C.M.R. 1983); United States v. Marcey, 25 C.M.R. 444 (C.M.A. 1958).

2. The offenses of assault with intent to commit rape and attempted rape are one and the same and should not be charged separately. United States v. Gibson, 11 M.J. 435 (C.M.A. 1981); United States v. Edwards, 35 M.J. 351 (C.M.A. 1992) (assault with intent to commit rape is multiplicious for findings with charge of attempted rape).

3. Consent may be a defense to assault with intent to commit a sexual offense. United States v. Davis, 15 M.J. 567 (A.C.M.R. 1983).

4. Assault with intent to commit rape and assault with intent to commit sodomy, upon the same victim during the same transaction, were not multiplicious for any purpose. United States v. Flynn, 28 M.J. 218 (C.M.A. 1989).

F. Adultery. UCMJ art. 134.

1. Elements. See generally United States v. Hickson, 22 M.J. 146 (C.M.A. 1986).

a. That the accused wrongfully had sexual intercourse with another.

b. That, at the time of intercourse, either the accused was married to another or his/her sexual partner was married to another.

c. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. See United States v. Melville, 25 C.M.R. 101 (C.M.A. 1958); United States v. Butler, 5 C.M.R. 213 (A.B.R. 1952); United States v. Johanns, 17 M.J. 862 (A.F.C.M.R. 1983).

2. Specification charging that accused had sexual intercourse with "a woman not his wife" did not allege necessary element of adultery, i.e., that one party to the sexual intercourse was married to a third person. Consistent with this specification, both of the participants could have been single. United States v. Clifton, 11 M.J. 842 (A.C.M.R. 1981); United States v. King, 34 M.J. 95 (C.M.A. 1992) (defective pleadings legally insufficient even under greater tolerance test).

3. Adultery is not a lesser included offense to rape. MCM, 1984, Part IV, para. 62; United States v. Hickson, supra; United States v. Maxwell, 21 M.J. 229 (C.M.A. 1986); United States v. McCrae, 16 M.J. 485 (C.M.A. 1983). Rather, they are inconsistent offenses which may be separately charged in the alternative.

G. Indecent Acts With Another. MCM, 1984, Part IV, para. 90c.

1. An indecent act is defined as "that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene and repugnant to common propriety, but which tends to excite lust and deprave the morals with respect to sexual relations." MCM, 1984, Part IV, para. 90c.

2. Physical touching not required, but participation of another is required. United States v. Thomas, 25 M.J. 75 (C.M.A. 1987); United States v. Murray-Cotto, 25 M.J. 784 (A.C.M.R. 1988); contra United States v. Jackson, 30 M.J. 1203 (A.F.C.M.R. 1990); United States v. Kenerson, 34 M.J. 704, (A.C.M.R. 1992).

3. Acts not inherently indecent may be rendered so by the surrounding circumstances, United States v. Proctor, 34 M.J. 549 (A.F.C.M.R. 1992) (spanking young boys on the bare buttocks found to be indecent under the circumstances).

4. Private, heterosexual, oral foreplay between two consenting adults that does not amount to sodomy is not an indecent act, United States v. Stocks, 35 M.J. 366 (C.M.A. 1992).

5. Not limited to female victim.

a. United States v. Annal, 32 C.M.R. 427 (C.M.R. 1963). Crime was committed when Army captain forcefully grabbed another male and tried to embrace him.

b. United States v. Holland, 31 C.M.R. 30 (C.M.A. 1961). Officer was convicted of indecent act by grabbing certain parts of the anatomy of another male officer.

c. Consensual homosexual acts may constitute the offense of indecent acts with another. United States v. Moore, 33 C.M.R. 667 (C.G.B.R. 1963)

6. No specific intent is required. United States v. Brundidge, 17 M.J. 536 (A.C.M.R. 1983); United States v. Jackson, 31 C.M.R. 738 (A.B.R. 1972).

7. Consent is not a defense. United States v. Carreiro, 14 M.J. 954 (A.C.M.R. 1982); United States v. Johnson, 4 M.J. 770 (A.C.M.R. 1978); United States v. Woodard, 23 M.J. 514 (A.C.M.R. 1986), set aside on other grounds, 24 M.J. 514 (A.F.C.M.R. 1987); United States v. Thacker, 37 C.M.R. 28 (C.M.A. 1966) (dicta).

8. Consensual intercourse in the presence of others can constitute an indecent act. United States v. Brundidge, 17 M.J. 586 (A.C.M.R. 1983).

9. Lesser included offense of indecent assault. United States v. Carter, 39 C.M.R. 764 (A.C.M.R. 1967).

10. Lesser included offense of attempted rape. United States v. Anderson, 10 M.J. 536 (A.C.M.R. 1980).

11. Indecent acts, charged as a violation of UCMJ art. 134, need not involve another person. United States v. Sanchez, 24 C.M.R. 32 (C.M.A. 1960) (chicken); United States v. Mabie, 24 M.J. 711 (A.C.M.R. 1987) (corpse).

H. Indecent Acts or Liberties with a Child Under 16. MCM, 1984, Part IV, para. 87.

1. Not limited to female victim.

2. Consent is no defense as a child of tender years is incapable of consent. MCM, 1984, Part IV, para. 87c.

3. Requires evidence of a specific intent to gratify the lust or sexual desires of the accused or the victim. United States v. Johnson, 35 C.M.R. 587 (A.B.R. 1965); see United States v. Robertson, 33 M.J. 832 (A.C.M.R. 1991) (absent a specific

intent to gratify lust, accused's act of buying 14 year-old daughter a penis shaped vibrator and "motion lotion" did not amount to an indecent act).

4. Two theories of misconduct.

a. Indecent acts.

(1) Physical contact is required. United States v. Payne, 41 C.M.R. 188 (C.M.A. 1970) (accused placed hand between child's legs); United States v. Sanchez, 29 C.M.R. 32 (C.M.A. 1960) (accused exposed his penis to child while cradling child in his arms.); see United States v. Rodriquez, 28 M.J. 1016 (A.F.C.M.R. 1989), aff'd, 31 M.J. 150 (C.M.A. 1990) (rubbing body against female patients). But see, United States v. Robertson, 33 M.J. 832 (A.C.M.R. 1991) (absent intent to arouse, accused's conduct in giving his 14 year-old stepdaughter a penis shaped vibrator did not amount to an indecent act.)

(2) Indecent act is "open and notorious" if performed in such a place and under such circumstances that it is reasonably likely to be seen by others. United States v. Carr, 28 M.J. 661 (N.M.C.M.R. 1989); see United States v. King, 29 M.J. 901 (A.C.M.R. 1989).

b. Indecent liberties.

(1) No physical contact is required, but act must be done within the physical presence of the child. United States v. Brown, 13 C.M.R. 10 (C.M.A. 1953) (accused's exposure of his penis to two young girls constituted an indecent liberty); United States v. Wellington, CM 440906 (A.C.M.R. 21 Dec. 81) (unpub.) (Upon accused's request, his daughter agreed to take nude pictures of her twelve-year-old girlfriend. With a Polaroid Camera provided by accused the daughter took two nude pictures of her friend and gave them to the accused who destroyed them two weeks later. The appellate court reversed the accused's conviction for indecent acts/liberties stating that his actions did not constitute the offense, i.e., they did not signify a form of immorality relating to sexual impurity which tends to excite lust and deprave morals with respect to sexual relations.); see United States v. Thomas, supra (participation of the child required); see United States v. Robba, 32 M.J. 771 (A.C.M.R. 1991) (victims presence implied.)

(2) Indecent liberties with a child can include displaying nonpornographic photographs if accompanied by the requisite intent. United States v. Orben, 28 M.J. 172 (C.M.A. 1989); see TJAGSA Practice Note, Displaying Nonpornographic Photographs to a Child Can Constitute Taking Indecent Liberties, The Army Lawyer, Aug. 1989, at 40 (discusses Orben).

I. **Indecent Exposure.** MCM, 1984, Part IV, para. 88.

1. Negligent exposure is insufficient; "willfulness" is required.

a. United States v. Manos, 25 C.M.R. 238 (C.M.A. 1958). Indecent exposure alleged where two air policemen observed the accused naked and drying himself in the upstairs, rear bedroom window of his quarters. Court-martial conviction of negligent exposure reversed. Held: negligent exposure not punishable under UCMJ.

b. United States v. Stackhouse, 37 C.M.R. 99 (C.M.A. 1967). The evidence was insufficient to sustain the accused's conviction of three specifications of indecent exposure where, in each instance, the accused was observed nude in his own apartment by passersby in the hallway looking in the partly open door of the apartment. In none of the incidents did the accused appear to make any motions, gestures, speak, or otherwise indicate he was aware of the presence of persons in the hallway. The accused did not seek in any manner to attract their attention. Such evidence is as consistent with negligence as with purposeful action and negligence is an insufficient basis for a conviction of indecent exposure. Accord United States v. Ardell, 40 C.M.R. 160 (C.M.A. 1969).

c. United States v. Burbank, 37 C.M.R. 955 (A.F.B.R. 1967). A plea of guilty to indecent exposure was not rendered improvident by stipulated evidence that the accused did nothing to attract attention to himself and may not even have been aware of the presence of the young females who saw him, where the accused admitted he had exposed himself in the children's section of the base library, a place so public an intent to be seen must be presumed.

2. "Public" exposure is required. To be criminal the exposure need not occur in a public place, but only be in public view. United States v. Moore, 33 C.M.R. 667 (C.G.B.R. 1963) (accused, who exposed his penis and made provocative gestures while joking with fellow seamen on board ship, was guilty of indecent exposure.)

3. Exposure must be "indecent." Nudity per se is not indecent; thus, an unclothed male among others of the same sex is generally neither lewd nor morally offensive. United States v. Caune, 46 C.M.R. 200 (C.M.A. 1973) (accused's conduct in removing all his clothing in the semi-privacy of an office and in the presence of other males, including his military superiors, may have been contemptuous and disrespectful, but did not constitute the offense of indecent exposure).

4. Found as a lesser included offense. United States v. Jackson, 30 M.J. 1203 (A.F.C.M.R. 1990).

J. Wrongful Cohabitation. MCM, 1984, Part IV, para. 69.

1. Not necessary to prove sexual intercourse. United States v. Melville, 25 C.M.R. 101 (C.M.A. 1958).

2. Evidence must show that accused was openly and publicly dwelling or living together as man and wife, but not that one was married to a third party. United States v. Melville, 25 C.M.R. 101 (C.M.A. 1958).

K. Fornication. UCMJ art. 134.

1. Not a Per Se UCMJ Violation. United States v Snyder, 4 C.M.R. 15 (C.M.A. 1952). See also, United States v. Blake, 33 M.J. 923 (A.C.M.R. 1991) (fornication, in and of itself, is not a crime in military law).

2. Case Developments. Private sexual intercourse between unmarried persons is not punishable. United States v. Hickson, 22 M.J. 146 (C.M.A. 1986). Context in which the sex act is committed may constitute an offense (e.g., public fornication, fraternization, etc.). See United States v. Berry, 20 C.M.R. 325 (C.M.A. 1956), where the court upheld a conviction under UCMJ art. 134 of two soldiers who took two German girls to a Berlin hotel room where each soldier had intercourse with each of the girls in open view. The court found such "open and notorious" conduct to be service discrediting. See also, United States v. Woodward, 23 M.J. 514 (A.F.C.M.R. 1986) vacated and remanded on other grounds, 23 M.J. 400 (C.M.A. 1987), findings set aside on other grounds, 24 M.J. 514 (A.F.C.M.R. 1987) (private, nonconsensual, intimate contact between a married officer and a 16-year-old babysitter was, under the circumstances, an indecent act).

L. Voyeurism/Peeping Tom. UCMJ art. 134.

1. In General. These offenses are not really sex crimes, but rather they are aggravated forms of disorderly conduct punishable under UCMJ art. 134.

2. Voyeurism. United States v. Johnson, 4 M.J. 770 (A.C.M.R. 1978). Accused's act of voyeurism by secreting himself in a women's restroom at the post cafeteria and peering over toilet stalls at unsuspecting victims constituted service discrediting conduct under UCMJ art. 134, not an indecent act with another.

3. Window Peeping.

a. Peeping is disorderly conduct under UCMJ art. 134 and may be pleaded as service discrediting or as prejudicial to good order and discipline. United States v. Foster, 13 M.J. 789 (A.C.M.R. 1982).

b. The gravamen of the offense is invading the privacy of other persons by spying upon them without their consent in their premises whether or not they are actually in view. United States v. Foster, 13 M.J. 789 (A.C.M.R. 1982); see also United States v. Clark, 22 C.M.R. 888 (A.F.B.R. 1956); United States v. Manos, 24 C.M.R. 626 (A.F.B.R. 1957).

c. Evidence that accused secreted himself in storage room with view of shower room and female officer's billet during early morning hours without any apparent lawful purpose, and that he knocked down and fled from female officer who accidentally discovered him, was legally sufficient to prove offense of housebreaking with intent to peep. United States v. Webb, 38 M.J. 62 (C.M.A. 1993).

M. Special Rules Of Evidence For Sex Offenses.

1. The accused's prior acts of uncharged rape with a different victim are inadmissible to prove lack of consent, but the evidence may be admitted on the issues of motive, identity or intent. United States v. Woolery, 5 M.J. 31 (C.M.A. 1978); see M.R.E. 404(b). Prior rapes of daughter during tender years, however, may be admissible to show later lack of consent. United States v. Clark, 15 M.J. 974 (A.C.M.R. 1983).

2. The trial judge may exclude spectators, if necessary, during the victim's testimony in order to encourage victim's candor. United States v. Moses, 4 M.J. 847 (A.C.M.R. 1978).

3. Circumstances and purposes for which evidence of the victim's character for chastity may be introduced at trial are listed in M.R.E. 412. See generally United States v. Hollimon, 12 M.J. 791 (A.C.M.R. 1982); United States v. Dorsey, 14 M.J. 556 (A.C.M.R. 1982). M.R.E. 412 applies when offense charged is carnal knowledge. United States v. Johnson, 17 M.J. 517 (A.F.C.M.R. 1983).

4. Victim's sexual reputation not material under facts. United States v. Pickens, 17 M.J. 391 (C.M.A. 1984).

5. For a discussion of expert testimony concerning personality traits of the victim, see United States v. Moore, 15 M.J. 354 (C.M.A. 1983); and for testimony on the effects of rape on the victim, see United States v. Cox, 23 M.J. 808 (N.M.C.M.R.

1986); United States v. Eastman, 20 M.J. 948 (A.F.C.M.R. 1985); and United States v. Hammond, 17 M.J. 218 (C.M.A. 1984); see also United States v. Savage, 30 M.J. 863 (N.M.C.M.R. 1990).

VI. OFFENSES AGAINST PROPERTY.

A. Larceny, Wrongful Appropriation. UCMJ art. 121.

1. Elements of the Offense.

Element 1: That the accused wrongfully took, obtained, or withheld property (not services) from another. The drafters intended to codify only common law larceny, larceny by false pretenses, and larceny by conversion. United States v. Mervine, 26 M.J. 482 (C.M.A. 1988); United States v. Tenney, 15 M.J. 779 (A.C.M.R. 1983); United States v. Herndon, 36 C.M.R. 8 (C.M.A. 1965); United States v. Dean, 33 M.J. 505 (A.F.C.M.R. 1991). UCMJ art. 121 lists the objects which can be the subject of larceny as "any money, personal property, or article of value of any kind." These theories of larceny can be used to cover credit card misuse. See generally United States v. Christy, 18 M.J. 688 (N.M.C.M.R. 1984). Military courts have held that theft of taxi cab services, phone services, use and occupancy of government quarters, and use of a rental car cannot be the subject of larceny under UCMJ art. 121. United States v. Abeyta, 12 M.J. 507 (A.C.M.R. 1981); United States v. Case, 37 C.M.R. 606 (A.B.R. 1966); United States v. Jones, 23 C.M.R. 818 (A.F.B.R. 1956); United States v. McCracker, 19 C.M.R. 876 (A.F.B.R. 1955). Theft of services may be prosecuted in any of the following ways: (1) under UCMJ art. 134 as obtaining services under false pretenses or as dishonorably failing to pay just debts; (2) under 18 U.S.C. § 641 as assimilated into military law by UCMJ art. 134(3) if the services taken are property of the United States; (3) as a violation of a state statute assimilated through 18 U.S.C. § 13. See United States v. Wright, 5 M.J. 106 (C.M.A. 1978), and United States v. Herndon, 36 C.M.R. 8 (C.M.A. 1965); see also United States v. Hitz, 12 M.J. 695 (N.M.C.M.R. 1981) (accused was properly charged with and convicted of unlawfully obtaining telephone services of the U.S. Navy in violation of UCMJ art. 134). Likewise, intangible items cannot be the subject of a UCMJ art. 121 violation. United States v. Mervine, supra (debt); United States v. Dunn, 27 M.J. 624 (A.F.C.M.R. 1988) (administrative costs).

a. Wrongful taking. Requires dominion, control, and asportation. See generally United States v. Carter, 24 M.J. 280 (C.M.A. 1987); United States v. Smith, 33 M.J. 527 (A.F.C.M.R. 1991).

(1) United States v. Sneed, 38 C.M.R. 249 (C.M.A. 1968). Where accused's accomplices were government

agents, larceny of government property could not stand as no taking ever occurred, i.e., articles were never out of government control. See United States v. Cosby, 14 M.J. 3 (C.M.A. 1982) (accused can be guilty of wrongful taking even though property was released to him by competent authority); see also United States v. Cassey, 34 C.M.R. 338 (C.M.A. 1964).

(2) United States v. Escobar, 7 M.J. 197 (C.M.A. 1979). The crime of larceny continues as long as the asportation, (i.e., carrying away) continues. The original asportation continues provided the perpetrator of the larceny indicates by his action that he is dissatisfied with the location of the stolen goods immediately after the larceny and causes the flow of their movement to continue relatively uninterrupted. Here, accused stole jacket off post and carried it onto post, thus providing court-martial jurisdiction over the offense. See also United States v. Henry, 18 M.J. 773 (N.M.C.M.R. 1984) (accused's mistaken claim-of-right defense negated during asportation phase).

(3) Because the crime of larceny continues through the asportation phase, anyone who knowingly assists in the actual movement of the stolen property is a principal in the larceny. No distinction is made whether the continuation of the asportation by one other than the actual taker was prearranged or the result of decisions made on the spur of the moment. United States v. Escobar, 7 M.J. 197 (C.M.A. 1979).

(a) United States v. Manuel, 8 M.J. 823 (A.F.C.M.R. 1979). Person who participates in on-going larceny may simply be an accessory after the fact, not a principal, depending upon the purpose of his participation. If participant's motive is to secure the fruits of the crime, the aider becomes a participant in the larceny and is chargeable with larceny; but if his motive is to assist the perpetrator to escape detection and punishment, he is properly charged as an accessory after the fact.

(b) United States v. Henderson, 9 M.J. 845 (A.C.M.R. 1980). Larceny of field jackets and silverware was complete when soldier having custody over these items moved them to another part of central issue facility with felonious intent. As such, when accused received the property it was already stolen and his actions did not make him a principal to larceny but rather only a receiver of stolen property under UCMJ art. 134.

(c) United States v. Bryant, 9 M.J. 918 (A.C.M.R. 1980). Accused and friend broke into a locked barracks room to "raise a little hell." While in the room accused's friend stole a raincoat. As the friend exited the room he handed the coat to accused and asked him to hold it. No larceny was planned prior to the break-in. In upholding accused's plea to larceny,

A.C.M.R. held that the larceny was on-going when accused took control of the coat. Accused was therefore a principal to the larceny.

(d) United States v. Cannon, 29 M.J. 549 (A.C.M.R. 1989). The assistance need not be prearranged. See generally TJAGSA Practice Note, Larceny and Proving Asportation, The Army Lawyer, Feb. 1990, at 67 (discusses Cannon).

(e) United States v. Keen, 31 M.J. 1108 (N.M.C.M.R. 1989). Asportation was ongoing when the accused helped the perpetrator of a larceny; therefore, the accused is guilty of larceny as an aider or abettor. See generally TJAGSA Practice Note, Aiding and Abetting Larceny, The Army Lawyer, Nov. 1990, at 40 (discusses Keen).

(4) Lost property. Taking an unexpired credit card found on a public sidewalk was larceny of lost property by wrongful taking since the card contained a clue as to the identity of the owner. United States v. Wiederkehr, 33 M.J. 539 (A.F.C.M.R. 1991); but see, United States v. Meeks, 32 M.J. 1033 (A.F.C.M.R. 1991) (keeping a t-shirt found mixed in with accused's laundry where there was no clue as to the owner was not a larceny).

b. Obtaining by false pretenses.

(1) United States v. Cummins, 26 C.M.R. 449 (C.M.A. 1958). In loan application, false promises to repay.

(2) United States v. Williams, 3 M.J. 555 (A.C.M.R. 1977), rev'd on other grounds, 4 M.J. 336 (1978). Knowledge of fraud not imputed between government agents.

(3) United States v. Seivers, 8 M.J. 63 (C.M.A. 1979). Insurance fraud larceny not complete until accused cashed settlement check.

(4) United States v. Carter, 24 M.J. 280 (C.M.A. 1987). Evidence insufficient to prove larceny by false pretenses. See also United States v, Vorda, 34 M.J. 725 (N.M 725 (N.M.C.M.R. 1992).

(5) United States v. Bolden, 28 M.J. 127 (C.M.A. 1989). Sham marriage to obtain monetary benefits.

(6) United States v. Flowerday, 28 M.J. 705 (A.F.C.M.R. 1989). Obtaining services by false pretenses (long-distance telephone services) is charged under article 134.

(7) United States v. Johnson, 30 M.J. 930 (A.C.M.R. 1990) (procuring casual pay by misrepresentation or failing to inquire into legitimacy of casual pay does not amount to larceny by false pretenses).

c. Withholding.

(1) United States v. Moreno, 23 M.J. 622 (A.F.C.M.R.), pet. denied, 24 M.J. 348 (C.M.A. 1986). Accused wrote checks against money erroneously deposited in his account.

(2) United States v. Castillo, 18 M.J. 590 (N.M.C.M.R. 1984). Embezzlement requires a fiduciary relationship and a lawful holding. See also United States v. McFarland, 23 C.M.R. 266 (C.M.A. 1957).

(3) United States v. Sicley, 20 C.M.R. 118 (C.M.A. 1955). Intent to permanently deprive must be concurrent with the taking/withholding.

(4) United States v. Paulk, 32 C.M.R. 456 (C.M.A. 1963). Wrongful conversion requires an accounting to the owner.

(5) United States v. Head, 6 M.J. 840 (N.C.M.R. 1979). The court found larceny by withholding when a victim mistook accused to be a robber and handed his wallet to the accused who, at that time, formed the intent and took money from the wallet. Though he abandoned the wallet, the accused was responsible for larceny of the sum he took.

(6) United States v. Sanderson, CM 438057 (A.C.M.R. 29 Jun. 79) (unpub.). Neither a receiver of stolen property nor an accessory after the fact can be convicted of larceny on the theory that, with knowledge of the identity of the owner, he withheld the stolen property from the owner; see also United States v. Jones, 33 C.M.R. 167 (C.M.A. 1963).

(7) United States v. Bilbo, 9 M.J. 800 (N.C.M.R. 1980). Accused who lawfully obtained loans from fellow marines but then failed to repay those loans was found guilty of wrongful appropriation, not larceny. N.C.M.R. further held that the UCMJ art. 134 offense of dishonorable failure to pay just debts was supported by the evidence.

(8) United States v. Hale, 28 M.J. 310 (C.M.A. 1989). Retention of rental car beyond period contemplated by rental contract constitutes wrongful appropriation.

(9) United States v. Watkins, 32 M.J. 327 (A.C.M.R. 1990). In the absence of a fiduciary duty to account,

a withholding of funds otherwise lawfully obtained is not larcenous.

d. Conversion.

(a) United States v. Cahn, 31 M.J. 729 (A.F.C.M.R. 1990). Accused was guilty of larceny by conversion when he retained an ATM card lended to him for withdrawing $20 as a loan, used the card to withdraw $500, and then destroyed it.

(b) United States v. Antonelli, 35 M.J. 122 (C.M.A. 1992). Conversion theory of larceny may apply to accused who receives BAQ and VHA allowances to support his dependents, but who does not actually provide support. See also, United States v. Thomas, 36 M.J. 617 (A.C.M.R. 1992) (Accused had a duty to inform government of change in circumstances, failing to do so he is guilty of larceny of funds he was not entitled to. But see, United States v. Antonelli, 37 M.J. 932 (A.F.C.M.R. 1993).

Element 2: That the property described belonged to a person other than the accused.

a. The "owner" is the person or entity with the superior right to possession. MCM, 1984, Part IV, para. 46c; United States v. Craig, 24 C.M.R. 28 (C.M.A. 1957) (erroneous allegation of ownership not a fatal defect); United States v. Cohen, 12 M.J. 573 (A.F.C.M.R. 1981) (even though the checks were intended for various banks and credit unions, the United States had possession of the checks while they were in the mail; thus the charge of larceny from the United States was proper); United States v. Jett, 14 M.J. 941 (A.C.M.R. 1982) (victim is anyone with a superior right of possession to the accused, regardless of who has title); United States v. Meadows, 14 M.J. 1002 (A.C.M.R. 1982) (can commit larceny or wrongful appropriation by taking military equipment from one unit to another); United States v. Leslie, 13 M.J. 170 (C.M.A. 1982) (United States had a possessory interest in C.O.D. funds that postal clerk stole instead of forwarding to senders of C.O.D. parcels; therefore, charge of larceny from the United States was proper); United States v. Lewis, 19 M.J. 623 (A.C.M.R. 1984) (government retains ownership in TDY advance); United States v. Foster, CM 440218 (A.C.M.R. 20 Nov. 81) (unpub.) (Accused was convicted of larceny of property of the United States but the property belonged to a nonappropriated fund. This variance was not fatal because the accused was not surprised or misled and was adequately protected from further prosecution for the same offense.).

b. A debt, United States v. Mervine, 26 M.J. 482 (C.M.A. 1988); see generally TJAGSA Practice Note, Larceny of a Debt: United States v. Mervine Revisited, The Army Lawyer, Dec. 1988, at 29, and the administrative costs associated with a

larceny, United States v. Dunn, 27 M.J. 624 (A.F.C.M.R. 1988); see generally TJAGSA Practice Note, Larceny of Administrative Costs: United States v. Dunn, The Army Lawyer, Mar. 1989, at 32, are not the proper subjects of a larceny.

Element 3: **That the property in question was of a value alleged, or of some value.**

a. Legitimate (retail) market value at time and place of theft must be established. United States v. Lewis, 13 M.J. 561 (A.F.C.M.R. 1982) (accused properly convicted of full value of item where he switched price tags and paid the lower price).

b. Government item: government price lists can be used to establish value. See M.R.E 803(17).

c. Non-government item: average retail selling price established by recent purchase price of like item, testimony of market expert, testimony of owner's opinion as to value, etc.

d. Value tokens: Writings representing value may be considered to have the value which they represent - even though contingently -at the time of the theft. MCM, 1984, Part IV, para. 46c(1)(g)(iii).

(1) United States v. Windham, 36 C.M.R. 21 (C.M.A. 1965) (drafted check--face value); see United States v. Riverasoto, 29 M.J. 594 (A.C.M.R. 1989).

(2) United States v. Cook, 15 C.M.R. 622 (A.F.B.R. 1954) (gasoline coupons -- face value).

(3) United States v. Frost, 46 C.M.R. 233 (C.M.A. 1973) (blank check--nominal value); see also United States v. Falcon, 16 M.J. 528 (A.C.M.R. 1983).

(4) United States v. Sowards, 5 M.J. 864 (A.F.C.M.R. 1978) (money orders -- face value); but see United States v. McCollum, 13 M.J. 127 (C.M.A. 1982) (value can include what items might bring in illegal channels--"thieves value").

(5) United States v. Stewart, 1 M.J. 750 (A.C.M.R. 1973) (airline ticket--face value).

(6) United States v. Tucker, 29 C.M.R. 790 (A.B.R. 1960) (credit card--nominal value).

(7) United States v. Payne, 9 M.J. 681 (A.F.C.M.R. 1980) (accounts receivable--nominal value).

e. In United States v. Batiste, 11 M.J. 791 (A.F.C.M.R. 1981), the court held that urine, which was to be sent to the laboratory for testing, was an article of value for purposes of larceny prosecution and the immediate substitution by accused of a like quantity of urine did not diminish the offense of wrongful appropriation.

Element 4: **That the taking, obtaining, or withholding was wrongful.**

a. In addition to the requirement for a specific intent to permanently deprive in larceny and a specific intent to temporarily deprive in wrongful appropriation, a separate requirement is that the taking, obtaining, or withholding be wrongful. MCM, 1984, Part IV, para. 46c(1)(d).

b. Taking military equipment for maintenance does not constitute wrongful appropriation. United States v. Taylor, 44 C.M.R. 274 (C.M.A. 1972). Similarly, the incidental use of a government vehicle for private purposes does not constitute misappropriation, provided the vehicle is also used for authorized purposes without diversion or deviation. United States v. Lutgert, 40 C.M.R. 94 (C.M.A. 1969).

c. Mere borrowing without consent is not always an offense. United States v. Harville, 14 M.J. 270 (C.M.A. 1982); United States v. Thomas, 34 C.M.R. 3 (C.M.A. 1963) (borrowing clothes from barracks occupant can be defense to wrongful appropriation).

d. The law allows self-help to secure or recover debt, United States v. Smith, 14 M.J. 68 (C.M.A. 1982); however, no retrieval is recognized for contraband. United States v. Petrie, 1 M.J. 333 (C.M.A. 1976). Further, self-help is not justified where the debt is uncertain; and, the value of the property taken must reasonably approximate the loss. United States v. Cunningham, 14 M.J. 539 (A.C.M.R. 1982); see also United States v. Eggleton, 47 C.M.R. 920 (C.M.A. 1973).

e. Motive does not negate intent. For example, if the accused took an item as a joke or to teach the owner a lesson about security the taking is nonetheless wrongful if, viewed objectively, the harm was caused; i.e. owner is permanently or temporarily deprived of the use or benefit of the property. MCM, 1984, Part IV, para. 46c(1)(f)(iii); United States v. Kastner, 17 M.J. 11 (C.M.A. 1983); United States v. Johnson, 17 M.J. 140 (C.M.A. 1984).

f. An accused who believes property to be abandoned lacks the mens rea required for larceny. United States v. Malone, 14 M.J. 563 (N.M.C.M.R. 1982); see also MCM, 1984, Part IV, para. 46c(1)(h)(i); see also United States v.

Turner, 27 M.J. 217 (C.M.A. 1988); United States v. Jones, 26 M.J. 1009 (A.C.M.R. 1988).

g. Intent to pay for, replace, or return property is not a complete defense. MCM, 1984, Part IV, para. 4c(1)(f)(iii)A)(B); see United States v. Brown, 30 M.J. 693 (A.C.M.R. 1990).

h. Overdraft protection may render accused's conduct not wrongful. United States v. McCanless, 29 M.J. 985 (A.F.C.M.R. 1990); see United States v. McNeil, 30 M.J. 648 (N.M.C.M.R. 1990); see generally TJAGSA Practice Note, Overdraft Protection and Economic Crimes, The Army Lawyer, Jul. 1990, at 45.

2. Multiplicity.

a. MCM rule: "When a larceny of several articles is committed at substantially the same time and place, it is a single larceny, even though the articles belong to different persons." MCM, 1984, Part IV, para. 46c(1)(h)(ii); accord United States v. Warner, 33 M.J. 522 (A.F.C.M.R. 1991); United States v. Ruiz, 30 M.J. 867 (N.M.C.M.R. 1990); United States v. Huggins, 12 M.J. 657 (A.C.M.R. 1981); United States v. Gutierrez, 42 C.M.R. 521 (A.C.M.R. 1970).

b. United States v. Florence, 5 C.M.R. 48 (C.M.A. 1952). Without evidence to justify joining larcenies into one specification and thereby increasing the penalty, the Government should have charged separately.

c. United States v. Gillingham, 1 M.J. 1193 (N.C.M.R. 1976). Theft of calculator from one office was not multiplicious with theft of second calculator, moments later, from adjoining office.

d. United States v. Alvarey, 5 M.J. 762 (A.C.M.R. 1978). Housebreaking and larceny in the same transaction were not multiplicious.

e. United States v. Burney, 44 C.M.R. 125 (C.M.A. 1971). Larceny and wrongful appropriation of a truck to transport stolen goods were not multiplicious.

f. United States v. Harrison, 4 M.J. 332 (C.M.A. 1978). Six larcenies and six facilitating false official statements were not multiplicious for sentencing purposes.

3. Divisible Property. United States v. Pardue, 35 C.M.R. 455 (C.M.A. 1965). Where the accused was charged only with larceny of an automobile, he may not be found not guilty of wrongful appropriation of the automobile but guilty of larceny of

an essential part, i.e., the tires. See also United States v. Jones, 13 M.J. 761 (A.F.C.M.R. 1982).

4. Permissive Inferences.

a. Inference of wrongfulness arising out of possession of recently stolen property. If the facts establish that property was wrongfully taken from the possession of the owner and that shortly thereafter the property was discovered in the knowing, conscious, exclusive, and unexplained possession of the accused, the fact-finder at trial may infer that the accused took the property. United States v. Pasha, 24 M.J. 87 (C.M.A. 1987); United States v. Hairston, 26 C.M.R. 334 (C.M.A. 1958); United States v. Morton, 15 M.J. 850 (A.F.C.M.R. 1983).

b. Passing cash register without offering to pay for an item concealed in the accused's pocket creates a permissive inference of intent to steal. United States v. Wynn, 23 M.J. 726 (A.F.C.M.R. 1986).

B. Credit Card/Automatic Teller Machine Offenses.

1. Any theory under UCMJ art. 134 or UCMJ art. 121 can support a conviction for credit card offenses. United States v. Christy, 18 M.J. 688 (N.M.C.M.R. 1984).

2. Larceny of another soldier's ATM card and the use of the card to make withdrawals are separate crimes and are separately punishable. United States v. Garner, 28 M.J. 634 (A.F.C.M.R. 1989); United States v. Abendschein, 19 M.J. 619 (A.C.M.R. 1984); United States v. Jobes, 20 M.J. 506 (A.F.C.M.R. 1985); but see United States v. Pullium, 17 M.J. 1066 (A.F.C.M.R. 1985).

3. Withdrawals from several different accounts using one banking machine are separate crimes. United States v. Aquino, 20 M.J. 712 (A.C.M.R. 1985).

4. Defense contention that bank consented to withdrawals by not programming ATM to prevent withdrawals from accounts having insufficient funds was rejected. United States v. Bushwell, 22 M.J. 617 (A.C.M.R. 1986).

C. Military Property As An Aggravating Factor For Larceny. See discussion of military property for art. 108 UCMJ.

D. Receiving Stolen Property.

1. Charged as a violation of UCMJ art. 134. United States v. Wolfe, 19 M.J. 174 (C.M.A. 1985).

2. The actual thief cannot be a receiver of the goods he has stolen. MCM, 1984, Part IV, para. 106(c)(1); United States v. Ford, 30 C.M.R. 3 (C.M.A. 1960); United States v. Henderson, 9 M.J. 845 (A.C.M.R. 1980). Thus, the original asportation (carrying away) of the property must be completed by the thief before another can be found guilty of receiving stolen property. United States v. Graves, 20 M.J. 344 (C.M.A. 1985).

3. The soldier who receives stolen property innocently and later discovers that it is stolen cannot be guilty of receiving stolen property. United States v. Rokoski, 30 C.M.A. 433 (A.B.R. 1960). "Receive" means to accept custody of; one cannot "receive" that which is already in his possession. United States v. Lowery, 19 M.J. 754 (A.C.M.R. 1984).

4. Although a principal who is not the actual thief may be liable as a principal or receiver of stolen property, he may not be found guilty of both. United States v. Cartwright, 13 M.J. 174 (C.M.A. 1982); MCM, 1984, Part IV, para. 106(c)(1).

5. A conspirator to the larceny may not be found guilty of being an accessory after the fact or a receiver of the stolen property. United States v. Lampani, 14 M.J. 22 (C.M.A. 1982).

7. Variance.

a. Because the identity of the victim is not an essential element of either larceny or wrongful appropriation, a variance in establishing ownership of the item taken will not always be fatal to the government's case. United States v. Craig, 24 C.M.R. 28 (C.M.A. 1957) (variance regarding victim in larceny case not prejudicial error); United States v. Davis, 31 C.M.R. 486 (C.G.B.R. 1962) (identity of victim of wrongful appropriation not an essential element); United States v. Roberto, 31 C.M.R. 349 (A.B.R. 1961) (variance as to ownership of funds in larceny case not fatal).

b. Variance in the date of the larceny may be fatal when the theory of larceny also changes. United States v. Wray, 17 M.J. 735 (C.M.A. 1984) (change of dates and theory from taking to taking and withholding was fatal variance).

E. Robbery. UCMJ art. 122.

1. Robbery is the taking, with intent to steal, of any thing of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or the person or property of a relative or member of his family or of anyone in his company at the time of the robbery. MCM, 1984, Part IV, para. 47c.

2. Pleading: the incomplete specification.

a. Failure to allege ownership of the property. United States v. Smith, 40 C.M.R. 432 (A.B.R. 1968) (no error); United States v. Goudeau, 44 C.M.R. 438 (A.C.M.R. 1971) (implied from allegation that item was taken from the purse of a named victim).

b. Failure to allege a taking from the person or in the presence of the victim is fatal, but the specification may be sufficient to allege larceny. United States v. Rios, 15 C.M.R. 203 (C.M.A. 954); United States v. Dozier, 38 C.M.R. 507 (A.B.R. 1967).

c. Failure to allege a taking "against his or her will." United States v. Smith, 40 C.M.R. 432 (A.B.R. 1968) (no defect; implied from allegation that taking was by means of force and violence).

3. Two theories: taking by force and/or violence or taking by putting in fear.

a. The alleged theory must be proved; evidence of the unalleged theory will not suffice. See United States v. Hamlin, 33 C.M.R. 707 (A.F.B.R. 1963); cf. United States v. Dozier, supra. Consequently, most prosecutors allege both theories.

Theory 1: Taking by force and/or violence.

(1) Victim's fear unnecessary.

(2) Amount of force required:

(a) Overcomes actual resistance, or

(b) Puts victim in a position not to resist, or

(c) Overcomes restraint of a fastening (e.g., in snatching purse the thief breaks strap of purse).

(3) The sequence and relationship of application of force and the intent to steal. Force and intent must be contemporaneous, but need not be simultaneous. If the accused's force and violence place the victim in vulnerable circumstances, this is sufficient for robbery if thereafter, while the victim is still vulnerable, the accused formulates the intent and takes the property. United States v. Chambers, 12 M.J. 443 (C.M.A. 1982); United States v. Washington, 12 M.J. 1036 (A.C.M.R. 1982).

(4) Picking a victim's pocket by stealth is not sufficient force for robbery; however, jostling a victim in conjunction with picking his pocket is sufficient force for robbery. United States v. Reynolds, 20 M.J. 118 (C.M.A. 1985).

Theory 2: Taking by putting in fear.

(1) Demonstration of force or menaces.

(2) Victim placed in fear of death or bodily injury in present or future to himself, relative, or anyone in his company at the time.

(a) Reasonable fear. The test for its existence is objective. United States v. Bates, 24 C.M.R. 738 (A.F.B.R. 1957).

(b) Sufficient to warrant giving up property.

(c) Sufficient to warrant making no resistance.

(3) Taking while fear exists.

4. Wrongful taking must be from the person or in the presence of the victim.

a. United States v. Cagle, 12 M.J. 736 (A.F.C.M.R. 1982). "Presence" for purposes of robbery means that possession or control is so imminent that force or intimidation is required to remove the property.

b. United States v. Mondonaldo, 34 C.M.R. 952 (A.B.R.), rev'd other grounds, 35 C.M.R. 257 (C.M.A. 1964). "In the presence" is satisfied where victim held by force while his property is secured from another building and destroyed before him.

c. United States v. Hamlin, 33 C.M.R. 707 (A.F.B.R. 1963). Property taken need not be from person of victim, but may be from victim's immediate control.

d. United States v. McCray, 5 M.J. 820 (A.C.M.R. 1978). No fatal variance exists between specification and proof where the former alleges "from the person" but evidence shows "in the presence."

5. Robbery is a composite offense combining larceny with assault. United States v. Chambers, supra; United States v. Brown, 33 C.M.R. 17 (C.M.A. 1963).

6. Robbery requires a larceny by wrongful taking. The other theories of larceny, wrongful withholding or obtaining, will not suffice. United States v. Brazil, 5 M.J. 509 (A.C.M.R. 1978).

7. The intent to rob need not be focused upon specific property. An intent to deprive the victim of whatever is in a pocket or purse is sufficient. United States v. Davis, 6 M.J. 669 (A.C.M.R. 1978).

8. The intent to rob need not precede or be simultaneous with the taking of the property. It must only be contemporaneous with such taking. United States v. Fell, 33 M.J. 628 (A.C.M.R. 1991); see also United States v. Washington, 12 M.J. 1036 (A.C.M.R. 1982); United States v. Henry, 18 M.J. 773 (N.M.C.M.R. 1984) (intent to steal formulated during asportation phase).

F. Waste, Spoil, Or Destruction Of Non-Military Property. UCMJ art. 109.

1. Scope of UCMJ Art. 109. All property, both real and personal, which is not military property of the United States.

a. Avis rental car, two passenger cars, a fence owned by a German corporation, and a German road marker. United States v. Valadez, 10 M.J. 529 (A.C.M.R. 1980).

b. Privately owned passenger car. United States v. Bernacki, 33 C.M.R. 175 (C.M.A. 1963).

c. Privately owned boat. United States v. Priest, 7 M.J. 791 (N.C.M.R. 1979).

d. Real and personal property belonging to officers' club. United States v. Geisler, 37 C.M.R. 530 (A.C.M.R. 1965).

e. Real and personal property belonging to post exchange. United States v. Underwood, 41 C.M.R. 410 (A.C.M.R. 1969); United States v. Schelin, 12 M.J. 575 (A.C.M.R. 1981), aff'd, 15 M.J. 210 (C.M.A. 1983); contra United States v. Mullins, 34 C.M.R. 694 (N.C.M.R. 1964) and United States v. Harvey, 6 M.J. 545 (N.C.M.R. 1978).

2. Real Property. This portion of UCMJ art. 109 proscribes the willful or reckless waste or spoilation of the real property of another.

a. Real property is defined as land, and generally whatever is erected on or growing on or affixed to

land. Black's Law Dictionary 1096 (5th ed. 1979).

b. The term "wastes" and "spoils", as used in this article, refers to such wrongful acts of voluntary destruction of or permanent damage to real property as burning down buildings, burning piers, tearing down fences, or cutting down trees. MCM, 1984, Part IV, para. 33c(1).

c. To be punishable the destruction must be done either willfully, that is intentionally, or recklessly, that is through the culpable disregard of the foreseeable consequences of some voluntary act. For examples of both willful and reckless conduct see previous discussion of UCMJ art. 108.

3. Personal Property. This portion of UCMJ art. 109 proscribes the willful and wrongful injury to non-military personal property.

a. Violation of this punitive article exists when personal, non-military property is either destroyed or damaged. To be destroyed, the property need not be completely demolished or annihilated, but need only be sufficiently injured to be useless for the purpose for which it was intended. Damage consists of any physical injury to the property. MCM, 1984, Part IV, para. 33c(2).

b. Mere negligent or reckless conduct does not entail the specific intent necessary to constitute this offense.

(1) United States v. Bernacki, 33 C.M.R. 175 (C.M.A. 1963). Accused, who had been drinking, misappropriated a civilian automobile in order to return to his unit. When he started to turn the wrong way into a one-way street, the civilian police sought to stop him. To avoid apprehension, the accused drove away at high speed through city streets and eventually was apprehended after wrecking the automobile. In reversing the accused's guilty plea to willfully damaging a privately owned automobile, the court stated that the offense of willful and wrongful damage to private property requires proof of an actual intent to damage, as distinguished from a reckless disregard of property. See also United States v. Valadez, 10 M.J. 529 (A.C.M.R. 1980).

(2) United States v. Jones, 50 C.M.R. 724 (A.C.M.R. 1975). Regardless of the intentional nature of the cause precipitating damage to personal, non-military property, in the absence of evidence that the destruction or damage was the intended result of the accused, a conviction under this portion of UCMJ art. 109 is not supported.

(3) United States v. Priest, 7 M.J. 791 (N.C.M.R. 1979). Accused's admission that he acted in grossly

negligent or reckless manner in operating a privately owned boat in shallow water was an insufficient basis for conviction of willfully damaging private personal property of another, in that such an offense must be committed "willfully."

(4) United States v. Youkum, 8 M.J. 763 (A.C.M.R. 1980). Evidence that accused got into his vehicle in a highly angered, vengeful state of mind, revved engine causing wheels to spin, reached high rate of speed in a short distance, aimed vehicle unerringly at victim as well as at parked vehicle from which victim had dismounted, and made no effort to stop until after he had damaged all three was sufficient circumstantial evidence to sustain conviction of willfully and wrongfully damaging vehicles.

(5) United States v. Garcia, 29 M.J. 721 (C.G.C.M.R. 1989). The accused must intend to cause the destruction or damage. Unintentionally breaking a jewelry case to take the contents is insufficient for guilt. See TJAGSA Practice Note, Damaging Property and Mens Rea, The Army Lawyer, Feb. 1990, at 66 (discusses Garcia).

c. Pleading the offense.

(1) United States v. Fuller, 27 C.M.R. 540 (A.B.R. 1958). A charge of willful damage of private property by reckless driving alleges nothing more than reckless driving, an offense punishable under UCMJ art. 111. The word "recklessly" cannot be used to modify the word "willfully" in any case involving damage to personal, non-military property.

(2) United States v. Valadez, 10 M.J. 529 (A.C.M.R. 1980). The court here rejected the Fuller interpretation of UCMJ art. 109 and ruled that under the circumstances of Valadez an inartfully drawn specification alleging the willful and wrongful damage of a private automobile by operating it in a reckless manner was not fatal.

4. Value. In the case of destruction, the value of the property destroyed controls the limit of punishment which may be adjudged, but in the case of damage, the amount thereof instead of the value of the property damaged is controlling. As a general rule, the amount of damage is the estimated or actual cost of repair by artisans employed in this work who are available to the community wherein the owner resides, or the replacement cost, whichever is less. See also the discussion of value pertaining to UCMJ art. 108.

G. Crimes Violating Protected Places - Burglary, Housebreaking, and Unlawful Entry.

1. What places are protected?

a. Burglary. UCMJ art. 129.

(1) "Occupied" dwelling includes houses, apartments, hotel rooms, barracks rooms, but not tents. MCM, 1984, Part IV, para. 55c(5).

(2) United States v. Bailey, 23 C.M.R. 862 (A.F.B.R. 1957). Affirming burglary conviction for breaking into barracks building to victimize occupant where the victim's room was not broken into.

(3) United States v. Norman, 16 M.J. 937 (A.C.M.R. 1983). Hotel room was dwelling place. Specification was sufficient despite failing to allege occupancy of room by the victim.

(4) See also United States v. Slovacek, 24 M.J. 140 (C.M.A. 1984); United States v. Fagan, 24 M.J. 865 (N.M.C.M.R. 1987); United States v. Thompson, 32 M.J. 65 (C.M.A. 1991).

b. Housebreaking. UCMJ art. 130.

(1) Building or structure: room, shop, store, office, apartment, stateroom, ship's hold, compartment of a vessel, inhabitable trailer, inclosed goods truck or freight car, tent, houseboat. MCM, 1984, Part IV, para. 56c(4); see generally TJAGSA Practice Note, Housebreaking Includes More Than Breaking Into a House, The Army Lawyer, Apr. 1989, at 56.

(2) United States v. Sutton, 45 C.M.R. 118 (C.M.A. 1972). Crime inapplicable to track vehicle.

(3) United States v. Hall, 30 C.M.R. 374 (C.M.A. 1961). Offense protects railroad freight car used to store goods.

(4) United States v. Scimeca, 12 M.J. 937 (N.M.C.M.R. 1982). Offense protects walk-in freezer.

(5) United States v. Cahill, 23 M.J. 544 (A.C.M.R. 1986). Offense protects AAFES delivery van used for storage.

(6) United States v. Demmer, 24 M.J. 731 (A.C.M.R. 1987). Offense protects AAFES snack truck used for storage.

c. Unlawful entry. UCMJ art. 134.

(1) Dwelling house, garage, warehouse, tent, vegetable garden, orchard, stateroom.

(2) United States v. Breen, 36 C.M.R. 156 (C.M.A. 1966). Crime does not protect service member's barracks locker. But see United States v. Lyons, SPCM 13432 (A.C.M.R. 29 Sept. 78) (unpub.).

(3) United States v. Gillin, 25 C.M.R. 173 (C.M.A. 1958). Crime inapplicable to an automobile. See also United States v. Reese, 12 M.J. 770 (A.C.M.R. 1981)

(4) United States v. Taylor, 30 C.M.R. 44 (C.M.A. 1960). Crime inapplicable to troop aircraft used as a conveyance.

(5) United States v. Love, 15 C.M.R. 260 (C.M.A. 1954). Offense protects troop billeting tent.

(6) United States v. Wickersham, 14 M.J. 404 (C.M.A. 1983). Offense protects fenced storage area.

(7) United States v. Fayne, 26 M.J. 528 (A.F.C.M.R. 1988). Showing that accused's estranged wife granted him permission to take water bed precluded conviction for unlawful entry of wife's residence.

2. The government must allege that the place violated was owned by one other than the accused. See generally United States v. Norman, 16 M.J. 937 (A.C.M.R. 1983).

3. "Breaking" requirement is limited to burglary.

a. Burglary requires that a "breaking" occur. This element demands a substantial and forcible act. More than the passing of an imaginary line is required. A breaking, removing, or putting aside of something material constituting a part of a dwelling house and relied on as a security against invasion is required. United States v. Hart, 49 C.M.R. 693 (A.C.M.R. 1975). A breaking may be either actual or constructive. A constructive breaking occurs when the entry is gained by trick, false pretense, or by intimidating the occupants through violence or threats. MCM, 1984, Part IV, para. 55c(2).

b. Pushing aside closed venetian blinds and entering through an otherwise open window constitutes a breaking. United States v. Thompson, 29 M.J. 609 (A.C.M.R. 1989), aff'd, 32 M.J. 65 (C.M.A. 1991); see generally TJAGSA Practice Note, Burglary and the Requirement for a Breaking, The Army Lawyer, Jan. 1990, at 32 (discussed the A.C.M.R. opinion in Thompson).

c. Specification failing to allege "break and" prior to "enter" was fatally defective. United States v. Hoskins, 17 M.J. 134 (C.M.A. 1984).

d. No such breaking is required for either housebreaking or unlawful entry. An unauthorized entry of the protected area is sufficient.

4. Intent requirements.

a. None for unlawful entry. United States v. Gillin, 25 C.M.R. 173 (C.M.A. 1958).

b. Housebreaking requires a specific intent to commit crime within. United States v. Walsh, 5 C.M.R. 793 (A.F.B.R. 1952) (intoxication a defense to housebreaking).

c. Burglary requires that at the time of the breaking the accused possess the specific intent to commit an offense described in UCMJ arts. 118-128. An intent to commit a different offense will sustain a guilty finding of housebreaking only. United States v. Kluttz, 25 C.M.R. 282 (C.M.A. 1958); see also United States v. Garcia, 15 M.J. 685 (A.F.C.M.R. 1983).

5. Multiplicity. Housebreaking with intent to commit larceny and larceny therein are not multiplicious. United States v. Alvarez, 5 M.J. 726 (A.C.M.R. 1978).

H. Arson. UCMJ art. 126.

1. Degrees of crime.

a. Aggravated arson. The willful and malicious burning or setting on fire of

(1) an inhabited dwelling whether occupied at the time or not; or

(2) any other structure, movable or immovable, wherein, to the knowledge of the offender, there is at the time a human being.

b. Simple arson. The willful and malicious burning or setting fire to the property of another under circumstances not amounting to aggravated arson.

2. The intent element.

a. All degrees of arson require proof of willfulness and maliciousness; that is, not merely negligence or accident. MCM, 1984, Part IV, para. 52c. Specific intent is not an element of aggravated or simple arson. United States v. Acevedo-Velez, 17 M.J. 1 (C.M.A. 1983) (intent requirement for aggravated arson met where accused set fire to a coat where there was a great possibility the building would catch on fire even though accused did not intend to burn the building); see United

States v. Marks, 29 M.J. 1 (C.M.A. 1989); United States v. Banta, 26 M.J. 109 (C.M.A. 1988). Voluntary intoxication is not a defense. United States v. Acevedo-Velez, supra; United States v. Caldwell, 17 M.J. 8 (C.M.A. 1983).

b. In the offense of aggravated arson by setting fire to an inhabited dwelling, the accused's knowledge of the type or purpose of structure is not required. United States v. Duke, 37 C.M.R. 80 (C.M.A. 1966) (intoxication no defense). Accused properly convicted of aggravated arson for burning his own uninhabited residence which later intended to abandon. United States v. Dagha, 23 M.J. 66 (C.M.A. 1986).

3. Actual burning or charring of alleged property or structure is required, and mere scorching or discoloration is insufficient. MCM, 1984, Part IV, para. 52c(2)(c); United States v. Litrell, 46 C.M.R. 628 (A.B.R. 1972) (burning of desk within building insufficient to prove aggravated arson; affirmed lesser included offense of attempted aggravated arson).

4. Disorderly conduct as lesser included offense. United States v. Evans, 10 M.J. 829 (A.C.M.R. 1981) (accused could be convicted of disorderly conduct as a lesser included offense of arson where specification alleged that accused was disorderly in quarters by setting fire to commode seat in latrine of his billets room and proof reasonably established all elements of disorderly conduct).

5. Simple arson is a lesser included offense of attempted aggravated arson. United States v. Dorion, 17 M.J. 1064 (A.F.C.M.R. 1984).

6. Burning with intent to defraud is a violation of UCMJ art. 134. See generally United States v. Banta, supra; United States v. Fuller, 25 C.M.R. 405 (C.M.A 1958); United States v. Snearley, 35 C.M.R. 434 (C.M.A. 1965); United States v. Driver, 35 C.M.R. 870 (A.F.C.M.R. 1965).

I. Bad Check Offenses.

1. UCMJ art. 123a - making, drawing or uttering check, draft or order with intent to defraud or deceive.

a. Elements:

(1) The accused makes, draws, utters or delivers a check/draft/order for payment of money upon a bank/depository.

(2) The above act is made while accused harbors either of the following specific intents:

(a) "the intent to defraud by the procurement of an article or thing of value OR

(b) "the intent to deceive . . . for payment of any past due obligation, or for any other purpose.

(3) The accused knew at the time of committing the illegal act that he did not or would not have sufficient funds/credit in the bank/depository for payment in full upon presentment.

(4) For a good discussion and application of these elements, see United States v. Carter, 32 M.J. 522 (A.C.M.R. 1990).

b. Definitions. MCM, 1984, Part IV, para. 49c.

(1) Written instruments covered. Includes any check, draft, or order for payment or money drawn upon any bank or other depository. See, e.g., United States v. Palmer, 14 M.J. 731 (A.F.C.M.R. 1982) (union share drafts).

(2) "Bank" or "other depository". Includes any business regularly but not exclusively engaged in public banking activities.

(3) "Making" and "drawing." Synonymous words and refer to act of writing and signing instrument.

(4) "Uttering" and "delivering." Both mean transferring instrument to another, but "uttering" includes offering to transfer.

(5) "For the procurement." Means for purpose of obtaining any article or thing of value.

(6) "For the payment." Means for purpose of satisfying in whole or part any past due obligation.

(7) "Sufficient funds." Means account balance at presentation is not less than face amount of check.

(8) "Upon its presentment." The time the demand for payment is made upon presentation of the instrument to the depository on which it was drawn.

c. The intent.

(1) "Intent to defraud" (UCMJ art. 123a(1)). An intent to obtain through misrepresentation, an article or thing of value with intent permanently or temporarily to apply it to one's own use or benefit. MCM, 1984, Part IV, para. 49c(14).

See United States v. Sassaman, 32 M.J. 687 (A.F.C.M.R. 1991).

(2) "Intent to deceive" (UCMJ art. 123a(2)). An intent to mislead, cheat, or trick another by means of a misrepresentation made for the purpose of gaining an advantage or of bringing about a disadvantage to another. MCM, 1984, Part IV, para. 14c(15).

(3) "Intent to deceive" is not the same as "intent to defraud." United States v. Wade, 34 C.M.R. 287 (C.M.A. 1964) (specification fails to state offense which alleges "making a check with intent to deceive for the purpose of obtaining lawful currency").

d. Articles or thing of value.

(1) Need not be obtained. United States v. Cordy, 41 C.M.R. 670 (A.C.M.R. 1967).

(2) Includes every right or interest in property or contract, including intangible, contingent, or future interests. United States v. Ward, 35 C.M.R. 834 (A.F.B.R. 1965) (check used to procure auto insurance).

e. "Past due obligation" or "any other purpose".

(1) "Past due obligation." Obligation to pay money which has legally matured prior to the making or uttering.

(2) "Any other purpose."

(a) Includes all purposes other than payment of past due obligation or the procurement of any article or thing of value, e.g., paying an obligation not yet past due.

(b) Excludes checks made for the purpose of obtaining any article or thing of value covered by UCMJ art. 123a(1). United States v. Wade, 34 C.M.R. 287 (C.M.A. 1964).

f. Knowledge.

(1) Requires present knowledge that bank account is presently, or will be, insufficient at time of presentment. See United States v. Crosby, 22 M.J. 854 (A.F.C.M.R. 19868); United States v. Matthews, 15 M.J. 622 (N.M.C.M.R. 1982).

(2) "Sufficient funds" relates to time of presentment.

(3) Neither proof of presentment nor refusal of payment is necessary, if it can otherwise be shown that accused had requisite intent and knowledge at time of making or uttering. For example: (a) drawn on nonexistent bank or (b) drawn on overdrawn or closed account.

g. Post-dated check. Compare United States v. Hodges, 35 C.M.R. 867 (A.F.B.R. 1965) (check made with requisite knowledge and intent; conviction affirmed), with United States v. Birdine, 31 M.J. 674 (C.G.C.M.R. 1990) (post-dated check did not support conviction, because no intent to deceive by accused; accused believed the checks would be covered).

h. Statutory 5-day notice. MCM, 1984, Part IV, para. 49c(17).

(1) Failure of maker to pay holder within 5 days after notice of non-payment is prima facie evidence that:

(a) Maker had intent to defraud or deceive.

(b) Maker had knowledge of insufficiency of funds.

(2) The above inference is only permissive and is rebuttable.

(3) Either failure to give notice or payment by accused within 5 days precludes prosecution use of inference, but it does not preclude conviction if elements are otherwise proved.

(4) Notice. United States v. Jarrett, 34 C.M.R. 652 (A.B.R. 1964) (reading of bad check charges to an account drawer by his detachment commander does not fulfill the statutory requirement of notice of dishonor); United States v. Cauley, 9 M.J. 791 (A.C.M.R. 1980), rev'd on other grounds, 12 M.J. 484 (C.M.A. 1982) (introduction at trial of letter from bank to accused's CO seeking his assistance in effecting payment of accused's dishonored checks did not alone constitute proper notice even though letter contained a notation indicating that a copy was to be forwarded to the accused).

(5) Period of redemption. The 5-day redemption period means 5 calendar days and is not limited to ordinary business days, at least when the terminal date is not a Sunday or holiday. Days are computed by excluding the first day and including the last day. United States v. O'Briant, 32 C.M.R. 933 (A.F.B.R. 1963).

i. Pleading check offenses.

(1) Specification charging that the accused at diverse times uttered worthless checks was legally sufficient to protect the accused from subsequent prosecutions. United States v. Carter, 21 M.J. 665 (A.C.M.R. 1985); see also United States v. Krauss, 20 M.J. 741 (N.M.C.M.R. 1985).

(2) "Mega-specs" permitted, but maximum punishment is determined by the max for the largest check within the specification. United States v. Poole, 24 M.J. 539 (A.C.M.R. 1987), aff'd, 26 M.J. 272 (C.M.A. 1988).

j. Defenses.

(1) Honest mistake of fact. United States v. Callaghan, 34 C.M.R. 11 (C.M.A. 1963) (belief funds credited to account a legitimate defense).

(2) Redemption beyond 5-day period. United States v. Bray, 34 C.M.R. 199 (C.M.A. 1964) (no defense).

(3) Check written to the "winner" in order to pay gambling debt. See United States v. Williams, 38 C.M.R. 119 (C.M.A. 1967) (a legitimate defense).

(4) Overdraft protection, relied upon by the accused without false pretenses, constitutes a defense to larceny and related bad check offenses. United States v. McCanless, 29 M.J. 985 (A.F.C.M.R. 1990); see United States v. Crosby, 41 C.M.R. 927 (A.F.C.M.R. 1969). Unilateral action by a bank in honoring checks, unknown to the accused, does not constitute a defense. United States v. McNeil, 30 M.J. 648 (N.M.C.M.R. 1990); see generally TJAGSA Practice Note, Overdraft Protection and Economic Crimes, The Army Lawyer, Jul. 1990, at 45.

(5) Reasonable expectation of payment. United States v. Webb, 46 C.M.R. 1038 (A.C.M.R. 1977) (accused who writes overdrafts but reasonably expects to have funds to deposit before presentment has a legitimate defense).

(6) Compulsive gambling not a defense where accused hoped to win large sums to redeem worthless checks. United States v. Zojak, 15 M.J. 845 (A.F.C.M.R. 1983).

2. UCMJ art. 134 - Worthless check by dishonorably failing to maintain sufficient funds.

a. Elements.

(1) That the accused made and uttered to a certain party a check for the alleged purpose.

(2) That the accused did thereafter fail to place or maintain sufficient funds in or credit with the bank for payment of such check in full upon its presentment for payment.

(3) That such failure was dishonorable.

(4) That such failure was prejudicial to good order and discipline or was service discrediting.

b. "Dishonorable" failure to maintain sufficient funds.

(1) Bad faith, gross indifference, fraud or deceit is necessary. United States v. Brand, 28 C.M.R. 3 (C.M.A. 1959).

(2) Negligent failure insufficient. United States v. Kess, 48 C.M.R. 108 (A.F.B.R. 1973).

(3) Redemption negates evidence of dishonorableness. United States v. Groom, 30 C.M.R. 11 (C.M.A. 1960).

(4) Evidence sufficient. United States v. Silas, 31 M.J. 829 (N.M.C.M.R. 1990).

(5) May occur after initial presentment. United States v. Call, 32 M.J. 873 (N.M.C.M.R. 1991).

c. Defenses.

(1) Lack of sophistication regarding checking insufficient for guilt under either an article 123a or article 134 theory. United States v. Elizondo, 29 M.J. 798 (A.C.M.R. 1989); see generally, TJAGSA Practice Note, Mens Rea and Bad Check Offenses, The Army Lawyer, Mar. 1990, at 36 (discusses Elizondo).

(2) Honest mistake, not a result of bad faith or gross indifference, is a legitimate defense. United States v. Connell, 22 C.M.R. 18 (C.M.A. 1956).

(3) Bad checks written to satisfy gambling debts not enforceable. United States v. Wallace, 36 C.M.R. 148 (C.M.A. 1966).

d. A lesser included offense to UCMJ art. 123a. United States v. Bowling, 33 C.M.R. 378 (C.M.A. 1963).

3. UCMJ art. 121 - Larceny or wrongful appropriation by check.

a. Utilizes the theory of larceny by false pretenses. United States v. Culley, 31 C.M.R. 290 (C.M.A. 1962).

b. Intent required.

(1) Intent to deprive or defraud permanently or temporarily. United States v. Cummins, 26 C.M.R. 449 (C.M.A. 1958).

(2) Carelessness or negligence in bookkeeping insufficient. United States v. Bull, 31 C.M.R. 100 (C.M.A. 1961).

(3) Restitution is no defense, except as it is evidence tending to disprove the accused's alleged intent.

c. Money, personal property, a thing of value must be obtained. Payment of past due obligation insufficient.

d. Defenses.

(1) All state of mind defenses apply. United States v. Roman, 16 C.M.R. 4 (C.M.A. 1954) (honest mistake).

(2) Gambling losses unenforceable. United States v. Walters, 23 C.M.R. 274 (C.M.A. 1957).

4. Evidentiary matters. In United States v. Dean, 13 M.J. 676 (A.F.C.M.R. 1982), the court held that checks and the notations thereon were admissible as business records under M.R.E. 803(6). The court further held, after judicially noticing U.C.C. § 3-510(b), that the checks were self-authenticating under M.R.E 902(b)(9). Cf. United States v. Matthews, 15 M.J. 622 (N.M.C.M.R. 1982) (notations that checks were stolen not admissible under U.C.C. § 3-510).

5. Multiplicity. Uttering check with intent to defraud under UCMJ art. 123a and larceny of currency by the checks under UCMJ art. 121 were multiplicious for findings. United States v. Ward, 16 M.J. 377 (C.M.A. 1983) (summary disposition); see also United States v. Allen, 16 M.J. 395 (C.M.A. 1983).

J. Forgery. UCMJ art. 123.

1. Two distinct types--making or altering, and uttering. MCM, 1984, Part IV, para. 48b.

2. For either type, the document must have legal efficacy. United States v. Hopwood, 30 M.J. 146 (C.M.A. 1990); United States v. Thomas, 25 M.J. 396 (C.M.A. 1988); MCM, 1984,

Part IV, para. 48c(4); see United States v. Ivey, 32 M.J. 590 (A.C.M.R. 1991) (checking account application); United States v. Victorian, 31 M.J. 830 (N.M.C.M.R. 1990).

a. Urinalysis report message from drug lab was not a "document of legal efficacy" and as such could not be subject of forgery. United States v. Johnson, 33 M.J. 1030 (N.M.C.M.R. 1991).

3. See generally TJAGSA Practice Note, Court Strictly Interprets Legal Efficacy, The Army Lawyer, Aug. 1990, at 35; TJAGSA Practice Note, Legal Efficacy as a Relative Concept, The Army Lawyer, Jan. 1990, at 34; TJAGSA Practice Note, Forgery and Legal Efficacy, The Army Lawyer, Jun. 1989, at 40.

VII. OFFENSES AGAINST THE ADMINISTRATION OF JUSTICE.

A. Resistance, Breach Of Arrest And Escape. UCMJ art. 95.

1. Elements.

a. Resisting apprehension

(1) That a certain person attempted to apprehend The accused.

(2) That said person was authorized to apprehend the accused, and

(3) That the accused actively resisted the apprehension.

b. Breaking arrest.

(1) That a certain person ordered the accused into arrest.

(2) That said person was authorized to order the accused into arrest; and

(3) That the accused went beyond the limits of arrest before being released from that arrest by proper authority.

c. Escape from custody.

(1) That a certain person apprehended the accused.

(2) That said person was authorized to apprehend the accused; and

(3) That the accused freed himself or herself from custody before being released by proper authority.

d. Escape from confinement.

(1) That a certain person ordered the accused into confinement.

(2) That said person was authorized to order the accused into confinement; and

(3) That the accused freed himself or herself from confinement before being released to proper authority.

2. Applications.

a. Resisting Apprehension.

(1) Subject's flight from apprehension, by itself, is insufficient to constitute resisting apprehension under article 95, UCMJ. United States v. Harris, 29 M.J. 169 (C.M.A. 1989); United States v. Burgess, 32 M.J. 446 (C.M.A. 1991).

(2) Soldier's attempt to prevent his apprehension by accelerating stolen vehicle, driving around a police barricade, swerving to avoid another vehicle placed in his path, and scattering sentries posted at the gate constituted "active resistance" sufficient to satisfy article 95. United States v. Malone, 34 M.J. 213 (C.M.A. 1992).

(3) Accused's acts were sufficient to constitute the offense of resisting apprehension where he temporarily terminated his flight, turned, faced his pursuer, and adopted a "fighting stance," and allowed pursuer to approach within five feet before resuming flight. United States v. Webb, 37 M.J. 540 (A.C.M.R. 1993).

b. Escape.

(1) Accused's unauthorized visits with his wife did not constitute the offense of escape from confinement where the visits occurred with the consent of accused's escorts and accused did not "cast off" his moral suasion. United States v. Standifer, 35 M.J. 615 (A.F.C.M.R. 1992).

(2) Accused's plea of guilty to escape from correctional custody was provident where he knowingly and freely admitted to status of physical restraint by being in correctional custody and stating that he avoided a monitor in order to depart.

United States v. Felix, 36 M.J. 903 (A.F.C.M.R. 1993).

(3) Accused's conviction for escape was not supported by evidence that he was allowed to go off base with escort, that escort left accused at accused's apartment, intending that accused would return to base with his wife, and that accused then killed his wife and fled. United States v. Anderson, 36 M.J. 963 (A.F.C.M.R. 1993).

(4) Where soldier is placed in confinement and is then temporarily removed from confinement facility while remaining under guard of another soldier, prisoner remains in confinement status, for purposes of escape charge, regardless of whether guard is armed or otherwise has physical prowess to subdue prisoner. United States v. Jones, 36 M.J. 1154 (A.C.M.R. 1993).

B. False Official Statement. UCMJ art. 107.

1. Relation to Federal Statute. Congress intended UCMJ art. 107 to be construed in parimateria with 18 U.S.C. § 1001. United States v. Jackson, 26 M.J. 377 (C.M.A. 1988); United States v. Aronson, 25 C.M.R. 29 (C.M.A. 1957). The purpose of UCMJ art. 107 is to protect governmental departments and agencies from the perversion of its official functions which might result from deceptive practices. United States v. Jackson, supra; United States v. Hutchins, 18 C.M.R. 44, 51 (C.M.A. 1955); see generally, TJAGSA Practice Note, The Court of Military Appeals Expands False Official Statement Under Article 107, UCMJ, The Army Lawyer, Nov. 1988, at 37.

2. Elements. The offense of making a false official statement has four elements: (1) that the accused signed a certain official document or made a certain official statement, (2) that the document or statement was false in certain particulars, (3) that the accused knew it to be false at the time of signing it or making it; and (4) that the false document or statement was made with the intent to deceive. MCM, 1984, Part IV, para. 31b.

3. Relation to Perjury. The offense of false official statement differs from perjury in that a false official statement may be made outside a judicial proceeding and materiality is not an essential element. MCM, 1984, Part IV, para. 3c(3). Materiality may, however, be relevant to the intent of the party making the statement. Id.; see also United States v. Hutchins, 18 C.M.R. 44 (C.M.A. 1955) (accused made a false official statement in connection with a line of duty investigation). Making a false official statement is not a lesser included offense of perjury. United States v. Warble, 30 C.M.R. 839 (A.F.C.M.R. 1960).

4. Independent Duty to Account and the Meaning of Officiality.

a. Formerly, a false statement to an investigator, made by a suspect who had no independent duty to account or answer questions, was not official within the purview of UCMJ art. 107. United States v. Osborne, 26 C.M.R. 235 (C.M.A. 1958); United States v. Aronson, 25 C.M.R. 29 (C.M.A. 1957); see also United States v. Davenport, 9 M.J. 364, 367-68 (C.M.A. 1980).

b. Later, the Court of Military Appeals determined that no independent duty to account was required if the accused falsely reported a crime. United States v. Collier, 48 C.M.R. 789 (C.M.A. 1974).

c. More recently, the court determined that officiality was not dependent upon an independent duty to account or initiation of a report. The focus is on the officiality of the statement-- whether an official governmental function was perverted by a false or misleading statement.

(1) United States v. Harrison, 26 M.J. 474 (C.M.A. 1988) (accused's false statement to battalion finance clerk in order to obtain an appointment for payment violates UCMJ art. 107).

(2) United States v. Jackson, 26 M.J. 377 (C.M.A. 1988) (misleading information provided by accused about a murder suspect's whereabouts, voluntarily given to law enforcement agents, constitutes a false official statement).

(3) United States v. Goldsmith, 29 M.J. 979 (A.F.C.M.R. 1990) (untrue responses to a civilian cashier constituted a false official statement).

(4) United States v. Ellis, 31 M.J. 26 (C.M.A. 1990) (anonymous note can constitute a false official statement); see generally TJAGSA Practice Note, An Anonymous Note Can Constitute a False Official Statement, The Army Lawyer, Mar. 1991, at 24 (discusses Ellis).

5. "Exculpatory No" Doctrine. The doctrine has traditionally been recognized under military law, but recent cases have placed severe limits on its effectiveness. See United States v. Prater, 32 M.J. 433 (C.M.A. 1991); United States v. Frazier, 34 M.J. 135 (C.M.A 1992); United States v. Sanchez, 39 M.J. 518 (A.C.M.R. 1993). The doctrine does not apply to false swearing offenses under UCMJ art. 134. United States v. Gay, 24 M.J. 304 (C.M.A. 1987).

6. Multiplicity. See United States v, NcCoy, 32 M.J. 906 (A.F.C.M.R. 1991).

C. False Swearing. UCMJ art. 134.

1. Elements. False swearing is the making under a lawful oath of any false statement which the declarant does not believe to be true. United States v. Davenport, 9 M.J. 364 (C.M.A. 1980). The offense of false swearing has seven elements: (1) that the accused took an oath or its equivalent; (2) that the oath or its equivalent was administered to the accused in a matter in which such oath or equivalent was required or authorized by law; (3) that the oath or equivalent was administered by a person having authority to do so, United States v. Hill, 31 M.J. 543 (N.M.C.M.R. 1990); (4) that upon this oath or equivalent the accused made or subscribed a certain statement; (5) that the statement was false; (6) that the accused did not then believe the statement to be true; and (7) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MCM, 1984, Part IV, para. 79b. It is service discrediting whether it occurs on or off post. United States v. Greene, 34 M.J. 713 (A.C.M.R. 1992).

2. Relation to Perjury. Although often used interchangeably, perjury and false swearing are different offenses. Perjury requires that the false statement be made in a judicial proceeding and be material to the issue. These requirements are not elements of false swearing, which is not a lesser included offense of perjury. See United States v. Smith, 26 C.M.R. 16 (C.M.A. 1958); United States v. Byard, 29 M.J. 803 (A.C.M.R. 1989); United States v. Claypool, 27 C.M.R. 533, 536 (A.B.R. 1958); United States v. Kennedy, 12 M.J. 620 (N.M.C.M.R. 1981); MCM, 1984, Part IV, para. 79c(1); but see MCM, 1984, Part IV, para. 57d(1) ("lessor included offenses. (1) Article 134-false swearing"). The drafters make no attempt to reconcile this provision with the authorities cited above. See MCM, 1984, Part IV, para. 57 analysis at A21-98. This provision, however, may be reconciled with those authorities if read in light of United States v. Warble, 30 C.M.R. 839, 841 n* (A.F.B.R. 1967) ("We are not called upon to decide whether the Smith case (dealing with Article 131[1] perjury and false swearing, as contrasted with statutory perjury and false swearing) would be held to be in any wise controlling in a statutory perjury charge (emphasis in original), aff'd, 30 C.M.R. 386 (C.M.A. 1961); UCMJ art. 131(2). False swearing and perjury should thus be pled in alternative specifications when appropriate.

3. Requirement for Falsity.

a. The primary requirement for false swearing is that the statement actually be false. MCM, 1984, Part IV, para.

79c(1). A statement need not be false in its entirety to constitute the offense of false swearing. Id., Part IV, para. 79b.

b. A statement that is technically, literally, or legally true cannot form the basis of a conviction even if the statement succeeds in misleading the questioner. Literally true but unresponsive answers are properly to be remedied through precise questioning. United States v. Arondel De Hayes, 22 M.J. 54 (C.M.A. 1986) (accused lied when he said that the listed items were "missing" as had an explanation for their absence); United States v. McCarthy, 29 C.M.R. 574 (C.M.A. 1960) (accused's friends stole some hubcaps which accused allegedly denied during a subsequent investigation).

c. Doubts as to the meaning of an alleged false statement should be resolved in favor of truthfulness. United States v. Kennedy, 12 M.J. 620 (N.M.C.M.R. 1981) (only certain portions of accused's statements to a NIS agent were false).

d. The truthfulness of the statement is to be judged from the facts at the time of the utterance. United States v. Burgess, 33 C.M.R. 97 (C.M.A. 1963) (evidence was insufficient in law to establish that accused made a false statement when accused stated that the seat covers in his car came from a German concern where the evidence showed that they did in fact come from a German concern, albeit by way of government purchase and theft from government stock); see United States v. Arondel De Hayes, 22 M.J. 54 (C.M.A. 1986) (accused lied when he said that the listed items were "missing" since he did have an explanation for their absence.

4. Two Witness Rule. The rule is applicable to false swearing. United States v. Arondel De Hayes, 22 M.J. 54 (C.M.A. 1986); United States v. Yates, 29 M.J. 888 (A.C.M.R. 1989); see TJAGSA Practice Note, Judge's Incorrect Ruling Correctly Affirmed, The Army Lawyer, Apr. 1990, at 70 (discusses Yates).

5. Use of Circumstantial Evidence. United States v. Veal, 29 M.J. 600 (A.C.M.R. 1989); see generally TJAGSA Practice Note, Using Circumstantial Evidence to Prove False Swearing, The Army Lawyer, Jan. 1990, at 36 (discusses Veal).

6. "Exculpatory No" Doctrine. The doctrine is not applicable to false swearing, as the primary concern is the sanctity of the oath. United States v. Gay, 24 M.J. 304 (C.M.A. 1987); see United States v. Tunstall, 24 M.J. 235 (C.M.A. 1987); United States v. Burgess, 33 C.M.R. 97 (C.M.A. 1963); United States v. Kennedy, 12 M.J. 620 (N.M.C.M.R. 1981).

D. **Perjury.** UCMJ art. 131.

1. In General. Perjury is the willful and corrupt giving, in a judicial proceeding or in a course of justice and upon a lawful oath or in any form allowed by law to be substituted for an oath, of any false testimony material to the issue or matter of inquiry. "Judicial proceeding" includes a trial by court-martial and "course of justice" includes an investigation under UCMJ art. 32. MCM, 1984, Part IV, para. 57c(1).

2. Perjury Distinguished From False Swearing and False Official Statement.

a. Although often used interchangeably, perjury and false swearing are different offenses. The primary distinctions are that perjury requires that the false statement be made in a judicial proceeding and be material to the issue, whereas these matters are not part of the offense of false swearing. As such, false swearing is not a lesser included offense of perjury. United States v. Smith, 26 C.M.R. 16 (C.M.A. 1958).

b. The offense of false official statement (UCMJ art. 107) differs from perjury in that such a statement can be made outside a judicial proceeding and materiality is not an essential element, but bears only on the issue of intent to deceive. It, too, is not a lesser included offense of perjury. United States v. Warble, 30 C.M.R. 839 (A.F.B.R. 1960).

c. Elements of the Offense.

(1) **That the accused took an oath or its equivalent in a judicial proceeding or at an Article 32 investigation.**

(a) The oath must be one required or authorized by law. MCM, 1984, Part IV, para. 57c(2)(d).

(b) UCMJ art. 42(b) requires that each witness before a court-martial be examined under oath. R.C.M. 405(h)(1)(A) provides that all witnesses who testify at a UCMJ art. 32 investigation do so under oath.

(c) R.C.M. 807 lists the various forms of oaths to be used at courts-martial and UCMJ art. 32 investigations. A literal application of such formats is not essential. The oath is sufficient if it conforms in substance to the prescribed form. At the request of the party being sworn an affirmation may be substituted for an oath.

(d) DA Pam 27-9, para. 3-149, defines an "oath" as a formal, external pledge, coupled with an appeal to the Supreme Being, that the truth will be stated. An "affirmation" is a solemn and formal, external pledge, binding upon one's conscience that the truth will be stated.

(e) The oath must be duly administered by one authorized to administer it. MCM, 1984, Part IV, para. 57c(2)(d).

(f) UCMJ arts. 41(c) and 136(a), along with R.C.M. 405 and R.C.M. 807, set out in detail those persons authorized to administer oaths at judicial proceedings and UCMJ art. 32 investigations.

(g) The president, military judge, trial counsel and assistant trial counsel for all general and special courts-martial, along with all investigating officers and judge advocates, are included in this group.

(h) If the accused is charged with having committed perjury before a court-martial, the jurisdictional basis of the prior court-martial must be proved beyond a reasonable doubt.

i) Ordinarily this may be shown by introducing in evidence pertinent parts of the record of trial of the case in which the perjury was allegedly committed or by the testimony of a person who was counsel, the military judge, or a member of the court in that case to the effect that the court was so detailed and constituted.

ii) Where (1) the evidence at trial on charges of perjury before another court-martial did not identify the convening authority of that court-martial; (2) no appointing order was either recited or introduced; and (3) no other evidence providing a factual basis for concluding the prior court was properly detailed and constituted is presented, the evidence was insufficient despite lack of objection by the defense at the trial level. United States v. McQueen, 4 C.M.R. 355 (N.C.M.R. 1974).

(i) A stipulation that an accused charged with perjury had testified as a witness at another trial; that he took an oath; that the oath was administered as required by law; and that the oath was administered by the trial counsel, a person having authority to administer the oath, was ineffective to establish the oath administered was legal, because whether the administration of the oath was legal or not is a conclusion of law and stipulations are effective only as to items of fact, not conclusions of law. United States v. McQueen.

(2) **That the accused willfully gave what he believed to be false testimony at the proceeding in question.**

(a) A witness may commit perjury by testifying that he knows a thing to be true when in fact he either knows nothing about it at all or is not sure about it, and this is so whether the thing is true or false in fact. MCM, 1984, Part IV, para. 57c(2)(a).

(b) A witness may also commit perjury in testifying falsely as to his belief, remembrance, or impression, or as to his judgment or opinion. Thus, if a witness swears that he does not remember certain matters when in fact he does or testifies that in his opinion a certain person was drunk when in fact he entertained the contrary opinion, he commits perjury if the other elements of the offense are present. MCM, 1984, Part IV, para. 57c(2)(a).

(c) To undermine the willfulness and knowledge elements of this offense the following defenses are available:

i) Voluntary intoxication. Intoxication may so impair the mental processes as to prevent a person from entertaining a particular intent or reaching a specific state of mind. To successfully argue this defense in a perjury prosecution, the evidence must show that the accused was intoxicated at the time he testified. Evidence that he was intoxicated at the time of the event about which he testified is immaterial insofar as raising this defense is concerned. United States v. Chaney, 30 C.M.R. 378 (C.M.A. 1961).

ii) Mistake of fact. Evidence that an accused charged with perjury was intoxicated at the time of the events about which he testified raises the defense of mistake since such evidence relates to his ability to see and recall what transpired. United States v. Chaney, 30 C.M.R. 378 (C.M.A. 1961).

(3) **That the false testimony provided was in respect to a material matter.**

(a) Determination of whether the false testimony was with respect to a material matter is a question of law to be determined by the military judge as an interlocutory question. Sinclair v. United States, 219 U.S. 263 (1928); United States v. Martin, 23 C.M.R. 437 (A.B.R. 1956); Annot. 22 A.L.R. Fed. 379 (1975).

(b) To constitute a "material matter", the matter need not be the main issue in the case. The test is whether the false statement has a natural tendency to influence,

or be capable of influencing, the decision of the tribunal in making a determination required to be made. United States v. McLean, 10 C.M.R. 183 (A.B.R. 1953). Materiality must be judged by the facts and circumstances in the particular case. The color of an accused's hair may be totally immaterial in one case, but decisively material in another. Weinstock v. United States, 231 F.2d 699 (D.C. Cir. 1956).

i) United States v. Martin, 22 C.M.R. 601 (A.B.R. 1956). X's testimony at Y's trial for sodomy that he had not been present when the alleged act occurred was material testimony, in that it reflected upon the issues of whether the offense had actually occurred and the credibility of the prosecution witnesses, who had testified that X was present at the time alleged and had verbally encouraged Y.

ii) United States v. Walker, 19 C.M.R. 284 (C.M.A. 1955). At X's trial for several assaults and batteries, the accused testified that he had been with X constantly during the critical period of time and had not seen X engage in any fights. Accused's testimony at X's trial was plainly material in that it raised an inference that no fights took place.

iii) State v. Swisher, 364 Mo. 157, 260 S.W.2d (1968). False denial of prior convictions by a witness in response to cross-examination conducted to impeach him and attack his credibility constitutes perjury, as such false testimony relates to a material matter.

iv) United States v. Small, NCM 78 1223 (N.C.M.R. 27 Mar. 1979) (unpub.). Accused was charged with passing worthless checks. During trial on the merits he took stand on his own behalf. One of the questions put to him dealt with the propriety of his wearing scuba divers' insignia. In response to whether he was authorized to wear such insignia the accused falsely responded in the affirmative. At his subsequent court-martial for perjury the accused admitted that he lied so that his credibility would not be adversely affected. The Navy Court of Military Review held that accused's false statement was material in that it involved the issue of his credibility, attested to his good character, and tended to show the probability of his innocence.

v) United States v. Martin, 23 C.M.R. 437 (A.B.R. 1956). Accused's testimony at a previous trial that he was authorized to wear certain decorations, which was not in fact the case, was a material matter for purposes of sustaining a charge of perjury.

(c) Even inadmissible evidence may be material and therefore the subject of a perjury charge. Where a

court improperly admits evidence, such impropriety is not per se evidence of immateriality if the evidence goes to the jury. See United States v. Whitlock, 456 F.2d 1230 (10th Cir. 1972); United States v. Parker, 447 F.2d 826 (7th Cir. 1971).

3. Corroboration: Special Evidentiary Rules.

a. A unique characteristic of UCMJ art. 131 is that it contains a quantitative norm as to what evidence must be presented to establish a crucial element of falsity. A mere showing of guilt beyond a reasonable doubt is not enough. Specifically:

(1) The falsity of accused's statement must be shown by the testimony of at least two witnesses or by the testimony of one witness which directly contradicts accused's statement plus other corroborating evidence.

(2) No conviction may be had for perjury, regardless of how many witnesses testify as to falsity and no matter how compelling their testimony may be, if such testimony is wholly circumstantial.

b. Documentary evidence directly disproving the truth of accused's statement need not be corroborated if the document is an official record shown to have been well known to the accused at the time he took the oath or if the documentary evidence appears to have sprung from the accused himself -or had in any manner been recognized by him as containing the truth - before the allegedly perjured statement was made. See generally Hall, The Two-Witness Rule in Falsification Offenses, The Army Lawyer, May 1989, at 11.

c. With the passage of Title IV of the Organized Crime Control Act of 1970 (18 U.S.C. § 1623), Congress eliminated application of the two witnesses rule in federal court and grand jury proceedings. In its stead was adopted a beyond a reasonable doubt standard. This statute, however, has not been made applicable to the military. See United States v. Lowman, 50 C.M.R. 749 (A.C.M.R. 1975); see also United States v. Tunstall, 24 M.J. 235 (C.M.A. 1987) where alleged false oath relates to two or more facts that one witness contradicts accused as to the one fact and another witness as to another fact, the two witnesses corroborate each other in the fact that accused swore falsely, and their testimony will authorize conviction); United States v. Lowman, 50 C.M.R. 749 (A.C.M.R. 1975) (accused's testimony contradicted by two witnesses); United States v. Jordan, 20 M.J. 977 (A.C.M.R. 1985) (two witnesses rule not applicable where falsity of accused's oath is directly proved by documentary testimony).

d. Inconsistent Sworn Statements. Because of the requirements of the "two witness rule," contradictory sworn statements made by a witness cannot by themselves be the basis of a perjury prosecution under UCMJ art. 131. For example, X testifies under oath that on 15 March he was in a certain bar with accused from 1900-2100. At the same or subsequent trial he again testifies under oath, but this time states that although he was in the bar from 1900-2100, he never saw the accused. Under military law insufficient evidence exists to prosecute X for perjury.

4. Application of evidentiary rules.

a. United States v. Downing, 6 C.M.R. 568 (A.F.B.R. 1952). Mere circumstantial evidence showing nonpresence at a hospital by nonexistence of entry in hospital records held to be insufficient.

b. United States v. McLean, 10 C.M.R. 183 (A.B.R. 1953). Weighty direct and circumstantial evidence of denied drinking.

c. United States v. Taylor, 19 C.M.R. 71 (C.M.A. 1955). Directly contradictory testimony of prosecution witness corroborated by strong circumstantial evidence.

d. United States v. Walker, 19 C.M.R. 284 (C.M.A. 1955). Proof by circumstantial evidence alone of falsity of accused's negative assertion of what he saw - something by its nature not susceptible of direct proof - was held to be sufficient. This exception was subsequently embodied in MCM, 1969, para. 210 (now in MCM, 1984, Part IV, para. 57c(2)(c)).

e. United States v. Guerra, 32 C.M.R. 463 (C.M.A. 1963). Contradictory testimony held not directly so, therefore insufficient.

f. United States v. Martin, 23 C.M.R. 437 (A.B.R. 1956). Documentary evidence directly disproving accused's assertion of holding various decorations insufficient where uncorroborated.

g. United States v. Anders, 23 C.M.R. 448 (A.B.R. 1956). Facts similar to those in United States v. Martin, supra. Documentary evidence properly corroborated by testimony negating claim of awards.

5. Res Judicata as a Defense.

a. The availability of res judicata as a defense to an accused charged with perjury is recognized in military law.

b. This doctrine is raised when accused testifies at his trial and is acquitted, but the Government wants to retry him for presenting false testimony at that trial. Under these circumstances res judicata will bar a conviction for perjury. United States v. Martin, 24 C.M.R. 156 (C.M.A. 1957); United States v. Hooten, 30 C.M.R. 339 (C.M.A. 1961); see generally Milhizer, Effective Prosecution Following Appellate Reversal: Putting Teeth Into the Second Bite of the Apple, II Trial Counsel Forum No. 4 (Apr. 1982).

c. When an accused is acquitted based on statements made at his trial and then makes similar statements at the trial of another person, res judicata is not available as a bar to a perjury prosecution of X for his subsequent statements because the principle of res judicata applies only to issues of fact or law put in issue and finally determined between the same parties. The accused was not a party to the second trial. United States v. Guerra, 32 C.M.R. 463 (C.M.A. 1963); see generally Hahn, Previous Acquittals, Res Judicata, and Other Crimes Evidence Under Military Rule of Evidence 404(b), The Army Lawyer, May 1983, at 1.

E. Obstruction Of Justice. UCMJ art. 134.

1. In General. Before the 1984 Manual, no discussion of this offense was found in either the UCMJ or the Manual. The Court of Military Appeals, however, has defined it in the following terms: "the essence of the offense denounced . . . is the obstruction or interference with the administration of justice in the military system . . ." United States v. Long, 6 C.M.R. 60, 65 (C.M.A. 1952). Actual interference, such as actually deterring a witness from cooperating, is not required. United States v. Wall, 13 M.J. 964 (A.F.C.M.R. 1982).

2. Traditionally these offenses have been charged in one of two ways: as a delict under UCMJ arts. 134(1) and (2) (prejudicial or service discrediting conduct) or under UCMJ art. 134(3) (violation of a non-capital federal statute). When charged under UCMJ art. 134(1) or (2) the elements of the federal statutes do not apply. United States v. Ridgeway, 13 M.J. 742 (A.C.M.R. 1982).

3. The 1984 Manual recognizes two UCMJ art. 134 violations: Obstructing Justice, MCM, 1984, Part IV, para. 96; and Destruction, Removal, or Disposal of Property to Prevent Seizure, MCM, 1984, Part IV, para. 103.

4. Obstructing Justice. MCM, 1984, Part IV, para. 96. When charged under UCMJ arts. 134(1) and (2) the ambit of the offense is much broader than under the United States Code. See United States v. Jones, 20 M.J. 38 (C.M.A. 1985). It proscribes efforts to interfere with the administration of

military justice throughout the investigation of a crime, not simply at pending judicial proceedings. The crime can be constituted where the accused had reason to believe that criminal proceedings were or would be pending. United States v. Tedder, 24 M.J. 176 (C.M.A. 1987); United States v. Bailey, 28 M.J. 1004 (A.C.M.R. 1989); United States v. Chodkowski, 11 M.J. 605 (A.F.C.M.R. 1981); but cf. United States v. Kellough, 19 M.J. 871 (A.F.C.M.R. 1985) (not obstruction to "plant" evidence where no proceeding pending; offense was a disorder under UCMJ art. 134). Criminal proceedings are broadly defined to include nonjudicial punishment. MCM, 1984, Part IV, para. 96c. An official act, inquiry, investigation, or other criminal proceeding with a view toward possible disposition in the military justice system is required. United States v. Gray, 28 M.J. 858 (A.C.M.R. 1989). MCM 1984, Part IV 96F is amended by Change 5 by making wrongfulness a required element.

a. Assault on witness who had testified at summary court-martial. United States v. Long, 6 C.M.R. 60 (C.M.A. 1952).

b. Intimidating witnesses who were to testify at a summary court-martial. United States v. Rossi, 13 C.M.R. 896 (A.F.B.R. 1953).

c. Intimidating a witness who was to appear before an UCMJ art. 32 investigating officer. United States v. Daminger, 31 C.M.R. 521 (A.F.B.R. 1961).

d. Attempt to influence and intimidate a witness to retract a statement made during course of UCMJ art. 15 hearing. United States v. Delaney, 44 C.M.R. 367 (A.C.M.R. 1971).

e. MP tried to conceal money which came into his possession in the course of official duty when the money was possible evidence pertaining to an alleged criminal offense by another person. United States v. Favors, 48 C.M.R. 873 (A.C.M.R. 1974).

f. Communications among co-conspirators not embraced by the conspiracy. United States v. Williams, 29 M.J. 41 (C.M.A. 1989); see United States v. Dowlat, 28 M.J. 958 (A.F.C.M.R. 1989).

g. Endeavoring to impede trial by soliciting a murder. United States v. Thurmond, 29 M.J. 709 (A.C.M.R. 1989).

h. Accused's threat to airman, which airman understood as an inducement to testify falsely if he were called as a witness at the accused's trial, constituted offense even if accused was not on notice that airman would be a witness. United

States v. Caudill, 10 M.J. 787 (A.F.C.M.R. 1981); United States v. Rosario, 19 M.J. 698 (A.C.M.R. 1984).

i. Attempt to have witness falsely provide an alibi. United States v. Gomez, 15 M.J. 594 (A.C.M.R. 1983).

j. Accused's act of simultaneously soliciting false testimony from two potential witnesses constituted a single obstruction of justice. United States v. Guerro, 28 M.J. 223 (C.M.A. 1989).

k. Asking witnesses to withdraw statements. United States v. Latimer, 30 M.J. 554 (A.C.M.R. 1990).

l. Accused's statement "don't report me" did not constitute obstruction of justice. United States v. Asfeld, 30 M.J. 917 (A.C.M.R. 1990).

m. Substituting toilet bowl water for a urine sample. United States v. Turner, 30 M.J. 984 (A.C.M.R. 1990); but see, United States v. Armstead, 32 M.J. 1013 (N.M.C.M.R. 1991) (providing a false urine sample under circumstances where a positive result indicating use of a prohibited substance is inadmissible as evidence in a subsequent criminal proceeding is not an obstruction of justice).

n. Specification sufficient, even though it did not allege that the investigation of the accused involved a violation of the UCMJ. United States v. Zaccheus, 31 M.J. 766 (A.C.M.R. 1990).

o. Seeking to have minor daughter's boyfriend influence daughter to change her testimony at a state court proceeding, in exchange for consenting to daughter's marriage to boyfriend. United States v. Smith, 32 M.J. 567 (A.C.M.R. 1991).

p. Applies to state court proceedings. United States v. Smith, 32 M.J. 567 (A.C.M.R. 1991).

q. Requisite intent not found unless accused aware that there is or possibly could be an investigation. United States v. Athey, 34 M.J. 44 (C.M.A. 1992).

r. No obstruction of justice where accused's conduct consisted only of calling friends and begging them not to press charges. United States v. Kirks, 34 M.J. 641 (A.C.M.R. 1992).

F. Destruction, Removal, or Disposal of Property to Prevent Seizure. MCM, 1984, Part IV, para. 103.

1. As defined in the 1984 Manual, the offense has no

requirement that criminal proceedings be pending or that the accused intended to impede the administration of justice. Cf. United States v. Ridgeway, 13 M.J. 742 (A.C.M.R. 1982). The crime is constituted where the accused intended to prevent the seizure of certain property that the accused knew persons authorized to make seizures were endeavoring to seize. MCM, 1984, Part IV, para. 103b.

2. Not a defense that the search or seizure was technically defective. MCM, 1984, Part IV, para. 103c.

G. Using The U.S. Code.

1. A more restrictive, and thus generally less desirable, way to charge this offense is under UCMJ art. 134(3) as a violation of one of the below-listed sections of the U.S. Code:

a. 18 U.S.C. § 1503 (1982) - Obstruction of proceedings before any federal court, commissioner, magistrate, or grand jury.

b. 18 U.S.C. § 1505 (1982) - Obstruction of proceedings before departments, agencies and committees.

c. 18 U.S.C. § 1510 (1982) - Obstruction of criminal investigations. See generally United States v. Casteen, 17 M.J. 580 (A.F.C.M.R. 1983) (not intended to deal with communications between accomplices).

d. 18 U.S.C. § 1511 (1982) - Obstruction of state or local law enforcement.

2. See Annot., 18 A.L.R. Fed. 875 (1974).

3. If the offense is charged under the U.S. Code, the military judge must instruct on the elements set out in the statute and the Government must prove the same. United States v. Canter, 42 C.M.R. 753 (A.C.M.R. 1970); see generally United States v. Ridgeway, 13 M.J. 742 (A.C.M.R. 1982).

4. Change 6 to the MCM may obviate the need for proceeding under some of these statutes as it amended article 134 to provide the offense of "Wrongful Interference With An Adverse Administrative Proceeding." See, Change 6 to MCM, 1984, Part IV, para 96a.

H. Lesser Included Offenses.

If properly pleaded, communicating a threat may be a lesser included offense of obstruction of justice. United States v. Craft, 44 C.M.R. 664 (A.C.M.R. 1971).

VIII. OFFENSES INVOLVING EVIL WORDS.

A. Bomb Threats. MCM, 1984, Part IV, para. 109.

1. Explanation. "Bomb threat" and "bomb hoax" offenses can be charged under either UCMJ art. 134(1) as conduct prejudicial to good order and discipline or under UCMJ art. 134(3), a non-capital federal crime violative of 18 U.S.C.

2. Punishment. The maximum punishment is based on 18 U.S.C. § 844(e).

3. "Innocent Motive." Just playing a joke is not a defense to "bomb hoax" charge, as the victim's concern, which satisfies the requirement for maliciousness, can be inferred. United States v. Pugh, 28 M.J. 71 (C.M.A. 1989); see TJAGSA Practice Note, "I Was Only Joking" Not a Defense to "Bomb Hoax" Charge, The Army Lawyer, Jul. 1989, at 39 (discusses Pugh).

B. Communicating A Threat. MCM, 1984, Part IV, para. 110.

1. Elements.

a. That the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;

b. That the communication was made known to that person or to a third person;

c. That the communication was wrongful;

d. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. Explanation. This offense consists of wrongfully communicating an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future. It relates to a potential violent disturbance of public peace and tranquility. United States v. Grembowic, 17 M.J. 720 (N.M.C.M.R. 1983).

3. Pleading The Threatening Language. United States v. Wartsbaugh, 45 C.M.R. 309 (C.M.A. 1972) (pleading sufficient because evidence of surrounding circumstances may disclose the threatening nature of the words).

4. Applications.

a. The requirement for an avowed present intent

or determination to injure.

(1) Personal disclaimer. United States v. Johnson, 45 C.M.R. 53 (C.M.A. 1972) ("I am not threatening you . . . but in two days you are going to be in a world of pain," constitutes a threat when considered within the totality of the circumstances).

(2) Conditional threat.

(a) The "impossible" variable. United States v. Shropshire, 43 C.M.R. 214 (C.M.A. 1971) (physical threat to guard by restrained prisoner not actionable as no reasonable possibility existed that threat would be carried out); see also United States v. Gately, 13 M.J. 757 (A.F.C.M.R. 1982) (upheld lesser included offense of provoking words).

(b) The "possible" variable. United States v. Holiday, 16 C.M.R. 281 (C.M.A. 1954) (unrestrained prisoner's threat to injure guard was actionable even though conditioned on guard's not pushing prisoner; the condition was one accused had no right to impose); see United States v. Alford, 32 M.J. 596 (A.C.M.R. 1991), aff'd 34 M.J. 150 (C.M.A. 1992).

(3) Idle jest, banter, and hyperbole are not threatening words. United States v. Gilluly, 32 C.M.R. 458 (C.M.A. 1963). In appraising the legal sufficiency of the evidence to sustain a conviction of communicating a threat, the circumstances surrounding the uttering of the words and consideration of whether the words were stated in jest or seriousness are to be evaluated. See United States v. Johnson, 45 C.M.R. 53 (C.M.A. 1972) (Considered in the light of the circumstances of the situation the following was held to be an illegal threat, "I am not threatening you, but I am telling you that I am not personally going to do anything to you, but in two days you are going to be in a world of pain," adding a suggestion that the victim "damn well better sleep light.")

(4) The words used by the accused are significant in that they may not evidence a technical threat but rather merely state an already completed act, e.g., "I have just planted a bomb in the barracks." Such a statement may constitute a simple disorder under UCMJ art. 134 or a false official statement under UCMJ art. 107 if made to a person in an official capacity (e.g., Charge of Quarters). To meet potential problems of proof, trial counsel should plead such offenses in the alternative. See United States v. Gilluly, 32 C.M.R. 458 (C.M.A. 1963).

b. Communication to the victim is unnecessary. United States v. Gilluly, 32 C.M.R. 458 (C.M.A. 1963).

c. No specific intent is required. The intent which establishes the offense is that expressed in the language of the declaration, not the intent locked in the mind of the declarant. This is not to say the declarant's actual intention has no significance as to his guilt or innocence. A statement may declare an intention to injure and thereby ostensibly establish this element of the offense, but the declarant's true intention, the understanding of the persons to whom the statement is communicated, and the surrounding circumstances may so belie or contradict the language of the declaration as to reveal it to be a mere jest or idle banter. United States v. Humphries, 22 C.M.R. 96 (C.M.A. 1956).

d. A threat to reputation is sufficient. United States v. Frayer, 29 C.M.R. 416 (C.M.A. 1960); see also United States v. Farkas, 21 M.J. 458 (C.M.A. 1986)(threat to sell victim's diamond ring sufficient).

e. Threats not directly prejudicial to good order and discipline nor service discrediting do not constitute an offense. United States v. Hill, 48 C.M.R. 7 (C.M.A. 1973) (lovers' quarrel).

f. Merger with an assault crime. United States v. Metcalf, 41 C.M.R. 574 (A.C.M.R. 1969) (threat after assault merges with assault for punishment purposes).

g. Threatening a potential witness may constitute obstruction of justice in violation of UCMJ art. 134. United States v. Rosario, 19 M.J. 698 (A.C.M.R. 1984); United States v. Baur, 10 M.J. 789 (A.F.C.M.R. 1981).

C. **Indecent Language.** MCM, 1984, Part IV, para. 89.

1. Elements.

a. That the accused orally or in writing communicated to another person certain language;

b. That such language was indecent;

c. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. Explanation.

a. "Indecent" language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. The language must

violate community standards.

b. In determining adequacy of an indecent language specification, factors to consider include fluctuating community standards, personal relationship existing between speaker and listener, and probable effect of communication as taken from four corners of the specification; another factor when a child is involved is the age of the child. United States v. Dudding, 34 M.J. 975 (A.C.M.R. 1992).

3. Aggravating Factor. If the communication is made in the physical presence of a child under the age of 16 years it will increase the maximum punishment from a bad conduct discharge and confinement for six months to a dishonorable discharge and confinement for two years. MCM, 1984, Part IV, para. 89e(1).

4. Applications.

a. Asking stepdaughter under age of 16 for permission to climb into bed with her communicated indecent language; question conveyed message as equally libidinous and obscene as telling stepdaughter that accused had been fantasizing about having sex with her. United States v. French, 31 M.J. 57 (C.M.A. 1990).

b. Indecent language specifications alleging that accused called a seven or eight-year-old female child "a bitch" and "a cunt" were sufficient to state an offense. United States v. Dudding, 34 M.J. 975 (A.C.M.R. 1992).

c. Conviction of two specifications of attempted indecent liberties was supported by substantial evidence, reflecting that accused approached two young boys and offered to pay them to remove their trousers. United States v. LeProwse, 26 M.J. 652 rev. denied 27 M.J. 475 (A.C.M.R. 1988).

5. Lesser Included Offenses.

a. Provoking speeches and gestures - art. 117.

b. Attempts - art. 80.

D. Provoking Words Or Gestures. UCMJ art. 117.

1. Relationship to Communicating a Threat. This is a lesser included offense of communicating a threat.

2. Intent. No specific intent is required. United States v. Welsh, 15 C.M.A. 573 (N.B.R. 1954).

3. Applications.

a. The provoking words must be used in the

presence of the victim and must be words which a reasonable person would expect to induce a breach of the peace under the circumstances. MCM, 1984, Part IV, para. 42(c).

(1) United States v. Thompson, 46 C.M.R. 88 (C.M.A. 1972). Because of the physical circumstances, the offensive words were unlikely to cause a fight.

(2) United States v. Wilson, NCM 78-0807 (N.C.M.R. 27 Sept. 1978) (unpub.). Giving officer "the finger" was a sufficiently provoking gesture.

(3) United States v. Shropshire, 34 M.J. 757 (A.F.C.M.R. 1992) Insulting comments to policeman by handcuffed suspect under apprehension were insufficient to constitute provoking words as police are trained to overlook abuse.

b. Not necessary that the accused know that the person towards whom the words or gestures are directed is a person subject to the UCMJ.

c. Merges with an assault crime. United States v. Palms, 47 C.M.R. 416 (A.C.M.R. 1973).

IX. DRUG OFFENSES.

A. The Statutory Framework.

1. Article 112a, UCMJ, provides in part:

> Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.

2. Types of Controlled Substances affected by Article 112a.

a. Article 112a, UCMJ, is a statute of limited scope in that it only prescribes conduct relating to three specific categories of controlled substances; it does not purport to "ban every new drug mischief." United States v. Tyhurst, 28 M.J. 671, 675 (A.F.C.M.R.), rev'd in part, 29 M.J. 324 (C.M.A.

1989). The substances regulated by the article are as follows:

(1) Opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana, and any compound or derivative of any such substance.

(2) Other substances listed on a schedule of controlled substances prescribed by the President for the purposes of Article 112a, UCMJ.

(3) Substances not included in (1) and (2) above that are nonetheless listed in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. § 812).

UCMJ art. 112a(b).

b. There are numerous hazardous substances that are being used by service personnel that are not expressly contained in any of the three categories described above. Such substances, particularly controlled substance analogues, may be included as a listed controlled substance by operation of other federal statutes. E.g., 21 U.S.C. § 813 (1988). In the absence of such a statute applicable to a particular hazardous substance, the use, possession, distribution, or manufacture or such substances may still be prohibited by other provisions of Title 21 of the U.S. Code. If this is the case, then such misconduct may be incorporated into the UCMJ and prosecuted under clause three of Article 134, UCMJ. See United States v. Reichenbach, 29 M.J. 128 (C.M.A. 1989).

3. Types of Conduct Prescribed by Article 112a, UCMJ. Article 112a prohibits an expansive array of conduct relating to controlled substances. The following types of conduct are expressly prohibited:

a. Possession.

b. Use.

c. Manufacture.

d. Distribution.

e. Import/Export.

f. Introduction.

g. Possession, Introduction, Manufacture with Intent to Distribute.

4. Maximum Punishments.

a. Generally. See MCM, 1984, pt. IV, ¶ 37e.

b. Aggravating Factors. Maximum punishments are increased by five years if any drug offense is committed while the accused is:

(1) on duty as a sentinel or lookout;

(2) on board a vessel or aircraft used by or under the control of the armed forces;

(3) in or at a missile launch facility used by or under the control of the armed forces;

(4) while receiving special pay under 37 U.S.C. § 310;

(5) in time of war; or

(6) in a confinement facility used by or under the control of the armed forces.

MCM, pt. IV, ¶ 37e (C6, 23 Dec 1993).

B. Use.

1. Defined.

a. "[T]o inject, ingest, inhale, or otherwise introduce into the human body, any controlled substance." MCM, 1984, pt. IV, ¶ 37c(10) (C6, 23 Dec 1993).

b. Administration or physical assimilation of a controlled substance into one's body or system. United States v. Harper, 22 M.J. 157 (C.M.A. 1986).

2. Elements. Memorandum, U.S. Army Legal Services Agency, JALS-TJ, subject: U.S. Army Trial Judiciary Benchbook Update Memo 4, ¶ 3-76.4 (5 May 1993).

a. Use of controlled substance.

b. Knowledge that the substance was used.

c. Knowledge of the contraband nature of the substance.

d. Use was wrongful, i.e., without legal justification or authorization.

3. Pleadings.

a. Because it is often impossible to prove the exact date and location of drug use and because time and location are not of the essence of this offense, courts allow some latitude in proving and pleading offenses of this sort. United States v. Miller, 34 M.J. 598 (A.C.M.R. 1992).

b. The prosecution must nonetheless prove beyond a reasonable doubt that the accused used controlled substance during the period of time alleged in the specification. United States v. Williams, 37 M.J. 972 (A.C.M.R. 1993); United States v. Lopez, 37 M.J. 702 (A.C.M.R. 1993).

4. Inferences and Proof of Use.

a. The mere presence of a controlled substance or its metabolites in one's body has not been held to be a fact sufficient to establish use of that controlled substance beyond a reasonable doubt. However, this fact and expert testimony that the chemical traces of the drug are not normally produced by the body or any other substance except the drug in question gives rise to a permissive inference that the accused did use a controlled substance. United States v. Harper, 22 M.J. 157 (C.M.A. 1986).

b. This permissive inference can be legally sufficient to satisfy the government's burden of proof as to the element of use. See United States v. Mance, 26 M.J. 244 (C.M.A. 1988).

5. Knowledge and Use.

a. There is no express mention of a mens rea requirement in the text of Article 112a for the use, possession, or distribution of controlled substances; the article merely prohibits the "wrongful" use, possession, or distribution of various controlled substances. See UCMJ art. 112a. Likewise the MCM does not identify a mens rea in its description of the elements of these offenses. See MCM, 1984, pt. IV, ¶ 37b(2). However, the Court of Military Appeals (COMA) has long held that the absence of knowledge as to the presence of the substance in question or its contraband nature may give rise to a mistake or ignorance of fact defense to charges of use or possession of controlled substance. E.g., United States v. Greenwood, 19 C.M.R. 335 (C.M.A. 1955). More recently, COMA explicitly held that court-martial panels must be instructed that an accused must knowingly possess or use a controlled substance to be criminally liable for such an act. United States v. Mance, 26 M.J. 244 (C.M.A. 1988).

b. There are two discrete types of knowledge that are relevant to the offenses in question: knowledge of the very **presence** of the substance, and knowledge of the **physical composition** of the substance. Mance, 26 M.J. at 253-54; United States v. Williams, 37 M.J. 972 (A.C.M.R. 1993).

(1) If an accused is unaware of the presence of a controlled substance in another, lawful substance, then the accused may have a defense of ignorance of fact. Such a circumstance may arise when a controlled substance is placed in a drink or other foodstuffs without the knowledge of the accused. The accused would lack the knowledge required for "use" of a controlled substance. Mance, 26 M.J. at 253-54.

(2) Alternatively, the accused may be aware of the presence of the substance but incorrectly believe that it is innocuous. This absence of knowledge as to the contraband nature of a substance may give rise to a mistake of fact defense. In this circumstance, the accused lacks the knowledge required to establish that the use was "wrongful." Id. at 254.

c. The presence of the controlled substance gives rise to a permissive inference that an accused possessed both types of knowledge required to establish wrongful possession or use. Mance, 26 M.J. at 254.

6. Applications.

a. Use of leftover prescription drugs for a different ailment than that for which they were prescribed does not necessarily constitute wrongful use as a matter of law. United States v. Lancaster, 36 M.J. 1115 (A.F.C.M.R. 1993).

b. One who knowingly ingests a controlled substance that he believes to be only cocaine, but actually contains cocaine laced with methamphetamine, may be found guilty of wrongful use of both substances; an accused need not know the exact pharmacological identity of the substance, but merely that it is contraband. United States v. Stringfellow, 32 M.J. 335 (C.M.A. 1991); see United States v. Miles, 31 M.J. 7 (C.M.A. 1990).

c. Accused not guilty of wrongful use of marijuana if he is a law enforcement official conducting legitimate law enforcement activities. United States v. Flannigan, 31 M.J. 240 (C.M.A. 1990); see generally TJAGSA Practice Note, Lawfully Using Marijuana to Protect One's Cover, Army Law., Mar. 1991, at 47 (discusses Flannigan).

C. Possession.

1. Elements. Memorandum, U.S. Army Legal Services

Agency, JALS-TJ, subject: U.S. Army Trial Judiciary Benchbook Update Memo 4, ¶ 3-76.1 (5 May 1993).

a. Possession of controlled substance.

b. Knowledge of possession.

c. Knowledge of contraband nature of substance.

d. Possession is wrongful, i.e., without legal justification or authorization.

2. Possession Defined.

a. Possession means the exercise of control over something, including the power to preclude control by others. United States v. Zubko, 18 M.J. 378 (C.M.A. 1984); MCM, 1984, pt. IV, ¶ 37c(2).

b. Possession may be direct or constructive.

c. More than one person may possess an item simultaneously.

3. Constructive Possession.

a. An accused constructively possesses a contraband item when he is knowingly in a position or had the right to exercise dominion and control over an item, either directly or through others. United States v. Traveler, 20 M.J. 35 (C.M.A. 1985).

b. Mere association with one who is known to possess illegal drugs is not sufficient to convict on a theory of constructive possession. United States v. Seger, 25 M.J. 420 (C.M.A. 1988).

c. Mere presence on the premises where a controlled substance is found or proximity to a proscribed drug is insufficient to convict on a theory of constructive possession. United States v. Wilson, 7 M.J. 290 (C.M.A. 1979); United States v. Corpening, 38 M.J. 605 (A.C.M.R. 1993)(presence in automobile in which contraband found, without more, legally insufficient to sustain conviction).

4. Innocent possession.

a. Old rule: An accused's possession of drugs was not wrongful if the accused took immediate steps to get rid of the contraband, including redelivery to the original owner. United States v. Rowe, 11 M.J. 11 (C.M.A. 1981); United States v. Needy, 15 M.J. 505 (A.F.C.M.R. 1983).

b. New rule: Accused's possession of drugs cannot be innocent if the accused neither destroys the drug immediately nor delivers them to the police. United States v. Kunkle, 23 M.J. 213 (C.M.A. 1987).

5. Deliberate ignorance. United States v. Newman, 14 M.J. 474 (C.M.A. 1983).

6. Attempted possession. One who possesses a legal drug believing it to be an illegal drug is guilty of attempted possession. United States v. Newak, 15 M.J. 541 (A.F.C.M.R. 1982). If the evidence is insufficient to identify the substance beyond a reasonable doubt, the accused may be guilty of attempted possession. United States v. LaFontant, 16 M.J. 236 (C.M.A. 1983).

7. Awareness of the presence of a controlled substance may be inferred from circumstantial evidence. MCM, 1984, Part IV, para. 37c(2). United States v. Mahan, 1 M.J. 303 (C.M.A. 1976); see generally DA Pam 27-9, para. 7-3; Hug, Presumptions and Inferences in Criminal Law, 56 Mil. L. Rev. 81 (1972).

8. Applications.

a. Accused in stockade is in "possession" of package of drugs mailed by him and returned to the stockade for inability to deliver. United States v. Ronhalt, 42 C.M.R. 933 (N.C.M.R. 1970).

b. Possession is not present where accused tells another to hold marijuana while the accused decides whether to accept it in payment for a car. United States v. Burns, 4 M.J. 573 (A.C.M.R. 1978).

D. Distribution.

1. MCM, 1984, Part IV, para. 37c(3) states: "Distribution" means to deliver to the possession of another. "Deliver" means the actual, constructive, or attempted transfer of an item, whether or not there is an agency relationship. It is a general intent crime. United States v. Brown, 19 M.J. 63 (C.M.A. 1984).

2. Distribution replaces sale and transfer and eliminates the "procuring agent" defense. United States v. Johnson, 481 F.2d 645 (5th Cir. 1973); see United States v. Fruscella, 44 C.M.R. 80 (C.M.A. 1971).

3. Wrongfulness. Wrongfulness is an essential element of distribution. United States v. Brecheen, 27 M.J. 67 (C.M.A. 1988).

4. Knowledge. Knowledge is an essential requirement of wrongful distribution. United States v. Crumley, 31 M.J. 21 (C.M.A. 1990).

5. Distribution can be accomplished whether or not the recipient is aware of the presence of drugs. United States v. Sorrell, 23 M.J. 122 (C.M.A. 1986).

6. Distribution can consist of passing drugs from one co-conspirator to another. United States v. Tuero, 26 M.J. 106 (C.M.A. 1988); see United States v. Figueroa, NMCM 88 2157 (N.M.C.M.R. 24 February 1989).

7. Distribution can consist of passing drugs back to the original supplier. United States v. Herring, 31 M.J. 637 (N.M.C.M.R. 1990); see generally TJAGSA Practice Note, Distributing Drugs to the Drug Distributor, The Army Lawyer, Mar. 1991, at 44 (discusses Herring).

8. Distribution includes the attempted transfer of drugs. United States v. Omick, 30 M.J. 1122 (N.M.C.M.R. 1989); see generally TJAGSA Practice Note, Does Drug Distribution Require Physical Transfer? The Army Lawyer, Nov. 1990, at 44 (discusses Omick).

9. Limits on distribution - the Swiderski exception.

a. Sharing drugs is distribution. United States v. Branch, 483 F.2d 955 (9th Cir. 1973); United States v. Ramirez, 608 F.2d 1261 (9th Cir. 1979).

b. When two individuals simultaneously and jointly acquire possession of a drug for their own use, intending to share it together, their only crime is joint possession. United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977).

(1) The Swiderski exception applies to the military. United States v. Hill, 25 M.J. 411 (C.M.A. 1988) (dicta).

(2) Examples of cases where facts do not raise Swiderski exception. United States v. Hill, 25 M.J. 411 (C.M.A. 1988); United States v. Viser, 27 M.J. 562 (A.C.M.R. 1988); United States v. Allen, 22 M.J. 512 (A.C.M.R. 1986); United States v. Tracey, 33 M.J. 142 (C.M.A. 1991); United States v. Lippoldt, 34 M.J. 523 (A.F.C.M.R. 1991).

10. An accused cannot aid and abet a distribution between two government agents, where accused's former "agent" became a government agent and sold to one known to the accused to be a government agent and the accused did not ratify the sale or accept the proceeds. United States v. Bretz, 19 M.J. 224 (C.M.A.

1985); United States v. Elliott, 30 M.J. 1064 (A.C.M.R. 1990); but cf. United States v. Dayton, 29 M.J. 6 (C.M.A. 1989) (accused guilty of distribution from source of one government agent to another government agent).

11. Intent to distribute.

a. Intent to distribute may be inferred from circumstantial evidence. Examples of evidence which may tend to support an inference of intent to distribute are: possession of a quantity of substance in excess of that which one would be likely to have for personal use; market value of the substance; the manner in which the substance is packaged; and that the accused is not a user of the substance. On the other hand, evidence that the accused is addicted to or is a heavy user of the substance may tend to negate an inference of intent to distribute. MCM, 1984, Part IV, para. 37c(6).

b. Possession with intent to distribute does not require ownership. United States v. Davis, 562 F.2d 681 (D.C. Cir. 1977).

c. To convict for possession with intent to distribute, fact finder must be willing, where no evidence is presented of actual distribution, to find beyond a reasonable doubt that the accused would not have possessed so substantial a quantity of drugs if he merely intended to use them himself. United States v. Morgan, 581 F.2d 933 (D.C. Cir. 1978); see also United States v. Turner, 24 L.Ed.2d 610 (1970) (because accused's possession of 14.68 grams of a cocaine and sugar mixture of which 5% was cocaine might have been exclusively for his personal use, evidence was insufficient to support conviction for distribution).

d. Evidence of resale value of drug may support inference of intent to distribute. United States v. Raminez-Rodriquez, 552 F.2d 883 (9th Cir. 1977).

e. Circumstantial evidence of intent to distribute may require expert testimony as to dosage units, street value, and packaging. See, e.g., United States v. Blake, 484 F.2d 50 (7th Cir.), cert. denied, 422 U.S. 919 (1979) (expert testimony that 14.3 grams of 17.3% pure heroin would make 420 "dime bags" having a St. Louis street value of $4,200); United States v. Wilkerson, 478 F.2d 813, 815 n. 3 (8th Cir. 1973) (49 pounds of marijuana worth $58,000 when first broken up and $71,500 if broken into joints); United States v. Echols, 477 F.2d 37 (8th Cir.), cert. denied, 414 U.S. 825 (1973) (199.73 grams of cocaine worth $200,000); United States v. Hollman, 541 F.2d 196 (8th Cir. 1976) (127 foil packets of heroin worth $20 each). See generally United States v. Gould, 13 M.J. 734 (A.C.M.R. 1982) (35 individually wrapped pieces of hashish).

f. A finding of addiction may support an inference that a large quantity of drugs were kept for personal use. See United States v. Raminez-Rodriquez, 552 F.2d 883 (9th Cir. 1977); United States v. Kelly, 527 F.2d 961 (9th Cir. 1976).

12. Evidence that the distribution was a sale will normally be admissible on the merits. If not, it may be admissible for aggravation in sentencing in a guilty plea or in a contested case. United States v. Vickers, 13 M.J. 403 (C.M.A. 1982); see United States v. Stokes, 12 M.J. 229 (C.M.A. 1982).

E. Manufacture.

1. MCM, 1984, Part IV, para. 37c(4) states:

> "Manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of such substance or labeling or relabeling of its container. The term "production" as used above includes the planting, cultivating, growing, or harvesting of a drug or other substance.

2. The definition is drawn from 21 U.S.C. § 802(14) and (21).

F. Introduction.

1. Introduction means to bring into or onto an installation, vessel, vehicle, or aircraft used by or under control of the Armed Forces. Installation is broadly defined and includes posts, camps, and stations. See generally United States v. Jones, 6 C.M.R. 80 (C.M.A. 1952) (Augsburg Autobahn Snack Bar a station).

2. An accused cannot be convicted of aiding and abetting introduction of marijuana by OSI agent where accused had already sold marijuana to agent off base and marijuana was agent's sole property when agent brought it onto base. United States v. Mercer, 18 M.J. 644 (A.F.C.M.R. 1984).

G. Wrongfulness.

1. MCM, 1984, Part IV, para. 37c(5) states:

> To be punishable under Article 134, possession, use, distribution, introduction, or manufacture of a controlled substance must be wrongful. Possession,

use, distribution, introduction, or manufacture of a controlled substance is wrongful if it is without legal justification or authorization. Possession, use, distribution, introduction, or manufacture of a controlled substance is not wrongful if such act or acts are: (A) done pursuant to legitimate law enforcement activities (for example, an informant who receives drugs as part of an undercover operation is not in wrongful possession); (B) done by authorized personnel in the performance of medical duties; or (C) without knowledge of the contraband nature of the substance (for example, a person who possesses cocaine, but actually believes it to be sugar, is not guilty of wrongful possession of cocaine). But possession, use, distribution, introduction, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial or other proceeding under the code shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use, possession, distribution, manufacture, or introduction was wrongful.

2. Generally, this provision did not change existing law. An exception is that it was not intended to perpetuate the holding of United States v. Rowe, 11 M.J. 11 (C.M.A. 1981) (accused who involuntarily comes into possession of drugs and who is apprehended while attempting to return them to a friend believed to be the true owner is not guilty of wrongful possession). MCM, 1984, Part IV, para. 37 (analysis); see also United States v. Neely, 15 M.J. 505 (A.F.C.M.R. 1983) (accused who remains in possession of found contraband for one day is not an innocent possessor).

3. Possessing drugs for the purpose of giving them over to authorities is no offense. United States v. Groover, 27 C.M.R. 165 (C.M.A. 1958).

4. An accused who involuntarily comes into possession and intends to give it to authorities, but forgets to do so, has a legitimate defense. United States v. Bartee, 50 C.M.R. 51 (N.C.M.R. 1974).

5. An accused who acts on a commander's suggestion to buy drugs in order to further a drug investigation is in innocent possession. United States v. Russell, 2 M.J. 433 (A.C.M.R. 1955).

6. Use (possession?) of an unprescribed narcotic drug for medicinal purposes is not wrongful. United States v. Jones, 28 C.M.R. 885 (A.F.B.R. 1959).

7. Possession" is not "wrongful" where an enlisted pharmacy specialist, pursuant to his understanding of local practice, maintains an average stock of narcotic drugs in order to supply sudden pharmacy needs or fill an inventory shortfall. This is so even though the stock was in his possession outside the pharmacy and its existence was prohibited by regulations. The latter fact might justify prosecution for violation of the regulation. United States v. West, 34 C.M.R. 449 (C.M.A. 1964).

8. Specification charging accused with possession of marijuana with intent to distribute was sufficient despite not alleging element of wrongfulness. United States v. Berner, 32 M.J. 570 (A.C.M.R. 1991).

9. Possession is a lesser included offense of possession with intent to distribute. United States v. Gould, 13 M.J. 734 (A.C.M.R. 1982); United States v. Burno, 624 F.2d 95 (10th Cir. 1980).

10. Proof of wrongfulness in urinalysis cases.

a. Permissive inference of wrongfulness drawn from the urinalysis test is sufficient to support a finding of wrongful use of marijuana. United States v. Ford, 23 M.J. 331 (C.M.A. 1987).

b. Laboratory results of urinalysis coupled with expert testimony explaining the results constituted sufficient evidence to establish beyond a reasonable doubt that the accused knowingly and wrongfully used marijuana. United States v. Harper, 22 M.J. 157 (C.M.A. 1987).

c. Results of urinalysis alone (with no expert testimony explaining the results) are insufficient to establish guilt. United States v. Murphy, 23 M.J. 310 (C.M.A. 1987); United States v. Mercer, 25 M.J. 160 (C.M.A. 1987) (summary disposition); United States v. Hagan, 24 M.J. 571 (N.M.C.M.R. 1987).

d. Recent decisions of the Courts of Military Review.

(1) Manual provision that allows use of a permissive inference to prove wrongful use is not unconstitutional. United States v. Bassano, 23 M.J. 661 (A.F.C.M.R. 1986).

(2) Conviction for drug use affirmed where government introduced lab report and stipulation explaining the report. United States v. Spann, 24 M.J. 508 (A.F.C.M.R. 1987).

e. Where accused knowingly ingested marijuana, but was unaware it was laced with cocaine, he was properly convicted of wrongful use of cocaine since the identity of the controlled substance ingested was not important in determining the wrongfulness of the use. United States v. Myles, 31 M.J. 7 (C.M.A. 1990). See United States v. Stringfellow, 32 M.J. 335 (C.M.A. 1991). United States v. Alexander, 32 M.J. 664 (A.C.M.R. 1991).

H. Drug Paraphernalia.

1. Because possession of "drug paraphernalia" constitutes only a remote and indirect threat to good order and discipline, it cannot be charged under UCMJ art. 134(1) as an offense which is directly and palpably prejudicial to good order and discipline. This offense therefore must be charged under UCMJ art. 92 as the violation of a general order/regulation or under UCMJ art. 134(3), assimilating a local state statute under 18 U.S.C. §13. United States v. Caballero, 49 C.M.R. 594 (C.M.A. 1975).

2. Most installations have promulgated local punitive regulations dealing with drug paraphernalia. AR 190-30, a nonpunitive regulation dealing with Military Police Investigations, cites the drug paraphernalia definition adopted by the United States Drug Enforcement Administration's model statute:

> Drug Abuse Paraphernalia. As a matter of policy, drug abuse paraphernalia is defined as all equipment, products, and materials of any kind that are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the Controlled Substance Act of 1970.

3. The DEA model statute has come under attack for being unconstitutionally vague and overbroad. Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916 (6th Cir. 1980), vacated and remanded, 451 U.S. 1013 (1981); see generally Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1981) (ordinance requiring a business to obtain a license if it sells any items "designed or marketed for use with illegal cannabis or drugs" upheld; DEA code as adopted in Ohio struck down).

4. Military regulations have also come under attack. United States v. Sweney, 48 C.M.R. 476 (A.C.M.R. 1974) (Fort Campbell regulation upheld as being neither vague nor overbroad); see also United States v. Cannon, 13 M.J. 777 (A.C.M.R. 1982) (upholding regulation prohibiting possession of instruments or devices that might be used to administer or dispense prohibited drugs); see generally United States v. Clarke, 13 M.J. 566 (A.C.M.R. 1982); United States v. Bradley, 15 M.J. 843 (A.F.C.M.R. 1983); United States v. Hester, 17 M.J. 1094 (A.F.C.M.R. 1984).

5. To show violation of a regulation by possessing drug paraphernalia, the government need only prove that the accused exercised dominion and control over the paraphernalia. United States v. McKnight, 30 M.J. 205 (C.M.A. 1990).

6. Applications.

a. Bindles, scales, zip-lock bags, and other materials associated with use or ingestion of drugs did not fall within regulatory prohibition of "drug abuse paraphernalia" of Navy Instruction. United States v. Painter, 39 M.J. 578 (N.M.C.M.R. 1993).

b. Written instructions for producing controlled substances could constitute "drug paraphernalia" within meaning of Air Force Regulation. United States v. McDavid, 37 M.J. 861 (A.F.C.M.R. 1993).

I. **Anabolic Steroids.** Now listed as Schedule III controlled substance (21 U.S.C. § 812 (c)) and their use, possession, or distribution is punishable under Art. 112a, UCMJ.

J. **Use of Firearms.** Carrying a firearm during a drug trafficking crime is a violation of 18 USC § 924(g) and may be separately punished.

K. **Use of a Communication Facility** (telephone, fax, beeper) to facilitate a drug transaction is a violation of § 843(b) and may be separately punished.

L. **Multiplicity.** Any discussion of the law of multiplicity must now begin with United States v. Teters, 37 M.J. 370 (C.M.A. 1993). In Teters, COMA adopted the so-called Blockburger elements test for resolving questions of multiplicity for findings. As a result, the following cases must be considered in light of the rule of law announced in Teters.

1. Simultaneous possession of different drugs constitutes only one offense for sentencing. United States v. Hughes, 1 M.J. 346 (C.M.A. 1976); United States v. Griffen, 8 M.J. 66 (C.M.A. 1979). Simultaneous use of two substances is

multiplicious for findings. United States v. Montgomery, 30 M.J. 1118 (N.M.C.M.R. 1989).

2. Sales at the same place between same parties but fifteen minutes apart were separately punishable. United States v. Hernandez, 16 M.J. 674 (A.C.M.R. 1983).

3. Possession of drugs from one cache at another time and place constitutes a separate offense warranting separate punishment. United States v. Marbury, 4 M.J. 823 (A.C.M.R. 1978).

4. Solicitation to sell and transfer of drugs are separately punishable when respective acts occurred at separate times (four hours apart) and at separate locations. United States v. Irving, 3 M.J. 6 (C.M.A. 1977).

5. Use was separately punishable from possession and sale where quantity used was not same as quantity possessed. United States v. Smith, 14 M.J. 430 (C.M.A. 1983); see United States v. Nixon, 29 M.J. 503 (A.C.M.R. 1989). But if quantity used and possessed is the same, possession charge is multiplicious for findings. United States v. Bullington, 18 M.J. 164 (C.M.A. 1984); see United States v. Hogan, 20 M.J. 221 (C.M.A. 1985); see generally United States v. Cumber, 30 M.J. 736 (A.F.C.M.R. 1990) (use and distribution of same drug not multiplicious for sentencing).

6. Attempted sale of a proscribed drug and possession of the same substance were so integrated as to merge as a single event subject only to a single punishment. United States v. Smith, 1 M.J. 260 (C.M.A. 1976); see also United States v. Clarke, 13 M.J. 566 (A.C.M.R. 1982).

7. Where charges of possession and transfer of heroin were based on accused's retention of some heroin after transferring a quantity of the drug to two persons who were to sell it on the open market as accused's agents, the two offenses were treated as single for purposes of punishment. United States v. Irving, 3 M.J. 6 (C.M.A. 1977).

8. Possession of one packet of drugs and simultaneous distribution of a separate packet of drugs was separately punishable. United States v. Wilson, 20 M.J. 3 (C.M.A. 1985) (summary disposition). Possession with intent to distribute of 35 hits of LSD was separately punishable from the simultaneous distribution of 15 hits of LSD. United States v. Coast, 20 M.J. 3 (C.M.A. 1985). Possession of LSD with intent to distribute was multiplicious with distribution of LSD. United States v. Kitts, 23 M.J. 105 (C.M.A. 1986); see United States v. Muller, 21 M.J. 205 (C.M.A. 1986); United States v. Jemmings, 20 M.J. 333 (C.M.A. 1985). Sale and possession of a separate, cross-town cache were

separately punishable. United States v. Isaacs, 19 M.J. 220 (C.M.A. 1985). Where the accused bought a large amount of marijuana to be sold in smaller quantities at a profit, where he made a final sale of approximately one eighth of it to a friend, and where the remainder was retained for future sales or other disposition, different legal and societal norms were violated by the sale and possession, and separate punishments were proper. United States v. Wessels, 8 M.J. 747 (A.F.C.M.R. 1980); accord United States v. Chisholm, 10 M.J. 795 (A.F.C.M.R. 1981); United States v. DeSoto, 15 M.J. 645 (N.M.C.M.R. 1982); United States v. Anglin, 15 M.J. 1010 (A.C.M.R. 1983); United States v. Ansley, 16 M.J. 584 (A.C.M.R. 1983); United States v. Worden, 17 M.J. 887 (A.F.C.M.R. 1984). Possession and distribution of cocaine on divers occasions are separate offenses. United States v. Bowers, 20 M.J. 1003 (A.C.M.R. 1985).

9. Introduction of drugs onto military installation and sale of portion on same day not multiplicious for sentencing. United States v. Beardsley, 13 M.J. 657 (N.M.C.M.R. 1982). Introduction and possession are, however, multiplicious. United States v. Decker, 19 M.J. 351 (C.M.A. 1985); United States v. Roman-Luciano, 13 M.J. 490 (C.M.A. 1982) (summary disposition); United States v. Miles, 15 M.J. 431 (C.M.A. 1983); United States v. Hendrickson, 16 M.J. 62 (C.M.A. 1983). But if the amount possessed is greater than the amount introduced, possession of the excess amount may not be multiplicious for any purpose if the excess amount is explained on the record. United States v. Morrison, 18 M.J. 108 (C.M.A. 1984) (summary disposition) (excess amount belonged to someone else); cf. United States v. Hill, 18 M.J. 459 (C.M.A. 1984) (possession of excess amount dismissed where not explained on the record). Finally, introduction and possession with intent to distribute are not multiplicious. United States v. Zupancic, 18 M.J. 378 (C.M.A. 1984).

10. Introduction with intent to distribute and distribution are multiplicious for findings. United States v. Wheatcraft, 23 M.J. 687 (A.F.C.M.R. 1986); contra United States v. Beecher, 16 M.J. 988 (A.C.M.R. 1983).

11. Larceny of and possession of same drugs not multiplicious for sentencing. United States v. Logan, 13 M.J. 821 (A.C.M.R. 1982).

12. Possession with intent to distribute and distribution are multiplicious for findings. United States v. Brown, 19 M.J. 63 (C.M.A. 1983). Possession and distribution when time, place, and amount are the same are multiplicious for findings. United States v. Zubko, 18 M.J. 387 (C.M.A. 1984).

13. Possession and possession with intent to distribute are multiplicious for sentencing. The appropriate

remedy is dismissal of the possession specification. United States v. Forance, 12 M.J. 312 (C.M.A. 1981) (summary disposition); United States v. Conley, 14 M.J. 229 (C.M.A. 1982) (summary disposition).

14. Possession of drugs and drug paraphernalia at the same time and place are multiplicious for sentencing. United States v. Bell, 16 M.J. 204 (C.M.A. 1983) (summary disposition).

15. Possession with intent to distribute and introduction are multiplicious. United States v. Antonitis, 29 M.J. 217 (C.M.A. 1989).

16. Distribution by injection and distribution of tablets of the same drug are multiplicious. United States v. Gumbee, 30 M.J. 736 (A.F.C.M.R. 1990).

17. Use and distribution based upon accused smoking a marijuana cigarette then passing it to a friend were not multiplicious for sentencing purposes. United States v. Ticehurst, 33 M.J. 965 (N.M.C.M.R. 1991).

18. For an example of prejudicial multiplicious pleading, see generally United States v. Sturdivant, 13 M.J. 323 (C.M.A. 1982) (charges dismissed where accused's phone conversation arguably setting up buy of his monthly marijuana ration led to 10 specifications being charged, a general court-martial conviction, and a sentence of dishonorable discharge, 3 years confinement and total forfeitures).

M. Special Rules of Evidence.

1. The laboratory report qualifies as a business record or public record exception to the hearsay rule and can be admitted into evidence once its authenticity is established. M.R.E. 803(6) and (8); United States v. Evans, 45 C.M.R. 353 (C.M.A. 1972); United States v. Miller, 49 C.M.R. 380 (C.M.A. 1974); United States v. Strangstalien, 7 M.J. 225 (C.M.A. 1979); United States v. Vietor, 10 U.S. 69 (C.M.A. 1980).

2. The admission of a laboratory report into evidence as either a business or public record does not give accused an automatic right to the attendance of the person who performed the test. Rather, the accused must make a showing as to the necessity for producing the witness. United States v. Vietor, 10 M.J. 69 (C.M.A. 1980).

3. DA Form 4137 (the chain of custody form) is admissible as either a business record or public record exception to the hearsay rule. M.R.E. 803(6) and (8); contra United States v. Nault, 4 M.J. 318 (C.M.A. 1978); United States v. Porter, 7 M.J. 30 (C.M.A. 1979); United States v. Neutze, 7 M.J.

32 (C.M.A. 1979); United States v. Oates, 560 F.2d 45 (2nd Cir. 1977); United States v. Helton, 10 M.J. 820 (A.F.C.M.R. 1980); United States v. Scoles, 33 C.M.R. 226 (C.M.A. 1963).

4. When dealing with fungible evidence such as drugs, military courts have traditionally required that an unbroken chain of custody be established to show that the drugs seized were in fact the drugs tested at the lab, and that they were not tampered with prior to testing. More recently, the Court of Military Appeals has broadened this approach and declared that even fungible evidence may be introduced without showing an unbroken chain of custody so long as the government can establish that the substance was contained in a "readily identifiable" package and that the contents of that package were not altered in any significant way. United States v. Parker, 10 M.J. 415 (C.M.A. 1981); United States v. Lewis, 11 M.J. 188 (C.M.A. 1981); United States v. Madela, 12 M.J. 118 (C.M.A. 1981); United States v. Ettelson, 13 M.J. 348, 35051 (C.M.A. 1982); see generally United States v. Morsell, 30 M.J. 808 (A.F.C.M.R. 1990); United States v. Hudson, 20 M.J. 607 (A.C.M.R. 1985).

5. The chemical nature of a drug may be established without the aid of a laboratory report or expert witness but with the testimony of a lay witness familiar with the physical attributes of the drug. United States v. Tyler, 17 M.J. 381 (C.M.A. 1984) (lay witness qualified to testify what used was cocaine despite alcohol intoxication at time of use). Tests administered by investigators to determine lay witness' ability to identify drugs were relevant to ability to identify drugs at time of use. United States v. Tyler, supra; United States v. Coen, 46 C.M.R. 1201 (N.C.M.R. 1972) (accused's statement); United States v. Torrence, 3 M.J. 804 (C.G.C.M.R. 1977) (accomplice witness); United States v. Watkins, 5 M.J. 612 (A.C.M.R. 1978) (informer and CID agent); United States v. Jenkins, 5 M.J. 905 (A.C.M.R. 1978) (accused's admission is not enough to establish nature of drugs without corroborative evidence); United States v. White, 9 M.J. 168 (C.M.A. 1980) (accused's corroborated extrajudicial statement); United States v. Morris, 13 M.J. 666 (A.F.C.M.R. 1982) (transferee and witness); United States v. Jessen, 12 M.J. 122, 126 (C.M.A. 1981) ("simulated smoking" by undercover agent); cf. United States v. Hickman, 15 M.J. 674 (A.F.C.M.R. 1983) (witness merely calling the substance "marijuana" at trial insufficient); but see United States v. LaFontant, 16 M.J. 236 (C.M.A. 1983) (if evidence insufficient to identify substance beyond a reasonable doubt, accused may be guilty of an attempt).

6. The buyer in a drug sale case is an accomplice, and the defense is entitled to an accomplice instruction. United States v. Hopewell, 4 M.J. 806 (A.F.C.M.R. 1978); United States v. Helton, 10 M.J. 820 (A.F.C.M.R. 1980); United States v. Scoles, 33 C.M.R. 226 (C.M.A. 1963). No such instruction is

required if buyer was Government informant. United States v. Hand, 8 M.J. 701 (A.F.C.M.R. 1980); United States v. Kelker, 50 C.M.R. 410 (A.C.M.R. 1975).

N. Defenses.

1. The fact that the amount of controlled substance involved in any given offense is de minimis is no defense except as it may bear on the issues of the accused's knowledge. United States v. Alvarez, 27 C.M.R. 98 (C.M.A. 1958); United States v. Nabors, 27 C.M.R. 101 (C.M.A. 1958); see MCM, 1984, Part IV, para. 37c(7).

2. Knowledge, ignorance and mistake defenses.

a. Ignorance of the law (not knowing that the substance was illegal) is no defense. United States v. Mance, 26 M.J. 244 (C.M.A. 1988); United States v. Greenwood, 19 C.M.R. 335 (C.M.A. 1955).

b. Ignorance of the physical presence of the substance is a legitimate defense ("I didn't know there was anything in the box . . . the locker . . . my pocket . . . the pipe."). United States v. Mance, supra.

(1) Ignorance need not be reasonable, only honest. United States v. Hansen, 20 C.M.R. 298 (C.M.A. 1955).

(2) Knowledge that a container was present, without knowledge of the presence of the substance within, will not defeat the defense. United States v. Avant, 42 C.M.R. 692 (A.C.M.R. 1970).

(3) The accused's suspicion that a substance may be present is insufficient for guilt. United States v. Whitehead, 48 C.M.R. 344 (N.C.M.R. 1973); United States v. Heicksen, 40 C.M.R. 475 (A.B.R. 1969); but see United States v. Valle-Valdez, 554 F.2d 911 (9th Cir. 1977).

(4) Under some circumstances deliberate ignorance of a fact can create the same criminal liability as actual knowledge. United States v. Newman, 14 M.J. 474 (C.M.A. 1983).

c. Ignorance or mistake as to "the physical composition or character" of the substance is a legitimate defense. ("I thought it was powdered sugar." "I didn't know what it was"). United States v. Mance, supra; United States v. Greenwood, 19 C.M.R. 335 (C.M.A. 1955); United States v. Ashworth, 47 C.M.R. 702 (A.F.C.M.R. 1973).

(1) The ignorance or mistake need not be reasonable. United States v. Fleener, 43 C.M.R. 974 (A.F.C.M.R. 1971).

(2) Knowledge of the name of the substance will not necessarily defeat the defense; to be guilty, the accused must know the "narcotic quality" of the substance. United States v. Crawford, 20 C.M.R. 233 (C.M.A. 1955); United States v. Baylor, 37 C.M.R. 122 (C.M.A. 1967) (Court approves instruction that accused "must know of the presence of the substance and its narcotic nature.").

(3) The mistake must be one which, if true, would exonerate the accused. United States v. Jefferson, 13 M.J. 779 (A.C.M.R. 1982) (mistake not exonerating where accused accepted heroin thinking he was getting hashish); see also United States v. Morales, 577 F.2d 769, 776 (2nd Cir. 1978); United States v. Jewell, 532 F.2d 699, 698 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1978).

3. Regulatory immunity. Issue of whether accused was entitled to regulatory exemptions of Army Regulation 600-85 were waived if not raised at trial. United States v. Gladdis, 12 M.J. 1005 (A.C.M.R. 1982); United States v. Mika, 17 M.J. 812 (A.C.M.R. 1984).

4. Entrapment. For a comprehensive review of the law in this area, please refer to chapter 5 of this deskbook.

CHAPTER 5

DEFENSES

I. "SPECIAL DEFENSES" vs. "OTHER DEFENSES."

Special defenses, the military's equivalent to affirmative defenses, are those which deny, wholly or partially, criminal responsibility for the objective acts committed, but do not deny that those acts were committed by the accused. Other defenses, such as alibi and mistaken identity, deny commission of the objective acts or other elements of the crime. R.C.M. 916(a).

II. PROCEDURE.

A. Raising a Defense.

1. The military judge must instruct upon all special defenses raised by the evidence. The test of whether a defense is raised is whether the record contains some evidence as to each element of the defense to which the trier of fact may attach credit if it so desires. United States v. Ferguson, 15 M.J. 12 (C.M.A. 1983); United States v. Tan, 43 C.M.R. 636 (A.C.M.R. 1971); see also United States v. Jackson, 12 M.J. 163 (C.M.A. 1982); United States v. Jett, 14 M.J. 941 (A.C.M.R. 1982). Generally, the reasonableness of the evidence is irrelevant to the military judge's determination to instruct. United States v. Thomas, 43 C.M.R. 89 (C.M.A. 1971); United States v. Symister, 19 M.J. 503 (A.F.C.M.R. 1984).

2. In deciding whether the defense is raised, the military judge is not to judge credibility or prejudge the evidence and preclude its introduction before the court members. United States v. Tulin, 14 M.J. 695 (N.M.C.M.R. 1982).

3. A defense is not raised, however, if it is wholly incredible or unworthy of belief. United States v. Brown, 19 C.M.R. 363 (C.M.A. 1955); United States v. Franklin, 4 M.J. 635 (A.F.C.M.R. 1977).

4. Appellate military courts are very generous in finding that a defense has been raised. See, e.g., United States v. Goins, 37 C.M.R. 396 (C.M.A. 1967) (self-defense raised against charge of assault with intent to commit rape). Any doubt whether the evidence is sufficient to require an instruction should be resolved in favor of the accused. United States v. Steinruck, 11 M.J. 322 (C.M.A. 1981).

5. In a members trial, the military judge must instruct the members, sua sponte, regarding all special defenses raised by the evidence. United States v. Sawyer, 4 M.J. 64 (C.M.A. 1977); United States v. Graves, 1 M.J. 50 (C.M.A. 1975); R.C.M. 920(e)(3).

6. In a bench trial, the impact of the raised defense is resolved by the military judge, sub silentio, in reaching a determination on the merits.

B. Burden of Proof. With the exception of lack of mental responsibility (see Chapter 4, infra), once a defense is raised the burden of proof is upon the government to disprove the defense beyond a reasonable doubt. United States v. Hurst, 49 C.M.R. 681 (A.C.M.R. 1974); R.C.M. 916(b).

C. Advising the Accused. If in the course of a guilty plea trial, the accused's comments or any other evidence raises a defense, the military judge must explain the elements of the defense to the accused. See generally UCMJ art. 45(a). The accused's comments raising the defense need not be credible. United States v. Lee, 16 M.J. 278 (C.M.A. 1983). Subsequently, if the accused does not negate the defense or other evidence belies the accused's negation of the defense, the military judge must withdraw the guilty plea, enter a plea of not guilty for the accused, and proceed to trial on the merits. United States v. Jemmings, 1 M.J. 414 (C.M.A. 1976).

D. Instructions. In instructing a military jury on a defense, the judge is under no obligation to summarize the evidence, but if he undertakes to do so, the summary must be fair and adequate. United States v. Nickoson, 35 C.M.R. 312 (C.M.A. 1965).

E. Consistency of Defenses.

1. Generally, conflicting defenses may be raised and pursued at trial. R.C.M. 916(b) (discussion); see generally United States v. Garcia, 1 M.J. 26 (C.M.A. 1975) (alibi and entrapment); United States v. Walker, 45 C.M.R. 150 (C.M.A. 1972) (lack of mental responsibility and self-defense); United States v. Lincoln, 38 C.M.R. 128 (C.M.A. 1967) (accident and self-defense); United States v. Snyder, 21 C.M.R. 14 (C.M.A. 1956) (heat of passion/ voluntary manslaughter and self-defense); United States v. Ravine, 11 M.J. 325 (C.M.A. 1981) (entrapment and agency); see also United States v. Viola, 26 M.J. 822, 827-28 (A.C.M.R. 1988); Nagle, Inconsistent Defenses in Criminal Cases, 92 Mil. L. Rev. 77 (1981).

2. The defense of self-defense is eviscerated by the defendant's testimony that he did not inflict the injury, regardless of what other evidence might show. United States v. Ducksworth, 33 C.M.R. 47 (C.M.A. 1963); United States v. Bellamy, 47 C.M.R. 319 (A.C.M.R. 1973); see also United States v. Crabtree,

32 C.M.R. 652 (A.B.R. 1962) (both duress and denial may not be raised).

III. THE DEFENSE OF ACCIDENT.

A. Defined. To be excusable as an accident, the act resulting in death or injury must have been the result of doing a lawful act in a lawful manner, free of negligence and unaccompanied by any criminally careless or reckless conduct. United States v. Rodriguez, 31 M.J. 150 (C.M.A. 1990); United States v. Moyler, 47 C.M.R. 85 (A.C.M.R. 1973). Accident is an unexpected act not due to negligence. It is not the unexpected consequence of a deliberate act. United States v. Pemberton, 36 C.M.R. 239 (C.M.A. 1966); R.C.M. 916(f); see generally TJAGSA Practice Note. The Defense of Accident: More Limited Than You Might Think, The Army Lawyer, Jan. 1989, at 45.

1. The lawful act. The unlawful nature of an accused's actions are apparent when performed in the course of committing a malum in se offense, e.g., robbery. Such is not the case, however, when a malum prohibitum offense is involved. In United States v. Sandoval, 15 C.M.R. 61 (C.M.A. 1954), the accused was charged with killing a fellow soldier. He claimed that the death resulted from an accidentally inflicted gunshot wound. The government argued that accident was not available as a defense because the accused's possession of the murder weapon was a violation of local regulations. The Court of Military Appeals' decision implied that violation of the regulation made the accused's act per se illegal and thus precluded access to the accident defense. Eighteen years later in United States v. Small, 45 C.M.R. 700 (A.C.M.R. 1972), the Army Court of Military Review stated that an accident instruction could be denied only if the act, illegal as violative of a general regulation, was the proximate cause of the injury inflicted. See also United States v. Tucker, 38 C.M.R. 349 (C.M.A. 1968); United States v. Taliau, 7 M.J. 845 (A.C.M.R. 1979).

2. The unexpected act. If an act is specifically intended and directed at another, the fact that the ultimate consequence of the act is unintended or unforeseen does not raise the accident defense.

a. United States v. Femmer, 34 C.M.R. 138 (C.M.A. 1964). No instruction on accident was required where the accused charged with aggravated assault admitted that the victim was injured by a razor blade in accused's hand which he used in a calculated effort to push the victim away from him. Because the injury resulted from an act intentionally directed at the victim, and the accused knew he held the razor blade when he carried out the act, accident of the kind that would absolve one of criminal liability was not involved.

b. United States v. Pemberton, 36 C.M.R. 239 (C.M.A. 1968). Accident is not synonymous with unintended injury. A particular act may be directed at another without any intention to inflict injury, but if the natural and direct consequence of the act results in injury, the wrong is not excusable because of accident. Accused's act of struggling with victim over a broken beer bottle was not directed at the victim but rather at wresting the bottle from the victim. Accident defense was therefore available although the judge in this case instructed improperly.

3. The non-negligent act. R.C.M. 916(f) discussion.

a. United States v. Sandoval, 15 C.M.R. 61 (C.M.A. 1954). Pushing door open with a loaded weapon does not constitute due care to allow accused to interpose accident defense to homicide.

b. United States v. Redding, 34 C.M.R. 22 (C.M.A. 1963). In the course of playing "quick draw," accused shot a friend with a pistol. Even though the evidence established that the injury was unintentionally inflicted, no accident instruction was required because of the accused's culpable negligence. Cf. United States v. Ferguson, 15 M.J. 12 (C.M.A. 1983) (negligent to brandish a shotgun with the safety off).

c. United States v. Moyler, 47 C.M.R. 82 (A.C.M.R. 1973). Carrying a weapon within the base camp with a magazine inserted, a round chambered, the safety off, and the selector on automatic, constitutes negligence as a matter of law. See also United States v. Rodriquez, 8 M.J. 648 (A.F.C.M.R. 1979).

d. United States v. Leach, 22 M.J. 738 (N.M.C.M.R. 1986). Swinging a knife upwards in close quarters of victim was negligent, so accident defense is not made out.

4. Negligent self-defense. Acting in self-defense can be the lawful act in a lawful manner for purposes of the accident defense. Negligent self-defense would deprive an accused of the accident defense. See United States v. Lett, 9 M.J. 602 (A.F.C.M.R. 1980) (using switchblade knife as passive deterrent was negligent self-defense); United States v. Taliau, 7 M.J. 845 (A.C.M.R. 1979) (unintentional injury to innocent third party excused where accused was engaging in lawful self-defense).

B. Assault by Culpable Negligence and the Defense of Accident.

1. Unavailability of the defense of accident because of the accused's failure to act with due care does not establish assault under the theory of a culpably negligent act. See United States v. Tucker, 38 C.M.R. 349 (C.M.A. 1968).

2. When raised by evidence, "defense" of accident applies to all allegations of assault; if accused is successful in raising reasonable doubt as to any requisite mens rea element, result is acquittal. United States v. Curry, 38 M.J. 77 (C.M.A. 1993).

IV. THE DEFENSE OF DEFECTIVE CAUSATION/INTERVENING CAUSE.

A. Defined. The accused is not criminally responsible for the loss/damage/injury if his or her act or omission was not a proximate cause.

1. Accused's act may be "proximate" even if it is not the sole or latest cause. United States v. Moglia, 3 M.J. 216 (C.M.A. 1977).

2. The accused is not responsible unless his or her act plays a "major role" or "material role" in causing the loss/damage/injury. United States v. Moglia, 3 M.J. 216 (C.M.A. 1977) (manslaughter conviction affirmed where the accused's act of selling heroin played "major role" in overdose death of buyer); United States v. Romero, 1 M.J. 227 (C.M.A. 1975) (manslaughter conviction affirmed where the accused's act of assisting overdose victim in inserting syringe into vein played "material role" in victim's death).

3. In a crime of negligent omission, the accused is not criminally responsible unless his or her omission was a "substantial factor," among multiple causes, in producing the damage. United States v. Day, 23 C.M.R. 651 (N.B.R. 1957) (ship commander's failure to keep engines in readiness held proximate cause of ship grounding in gale).

B. Intervening Cause.

1. The intervening cause test from DA Pam 27-9, para. 5-4, § II, n. 2, states that the accused is not criminally responsible for the crime if:

a. The injury or death resulted from an independent, intervening cause;

b. The accused did not participate in the intervening cause, and

c. The intervening cause was not foreseeable.

2. Intervening cause test from 26 Am. Jur. Homicide, § 50, cited with approval in United States v. Houghten, 32 C.M.R. 3 (C.M.A. 1962), states that: "If it appears that the act of the accused was not the proximate cause of the death for which he is

being prosecuted, but that another cause intervened, with which he was in no way connected and but for which death would not have occurred, such supervening cause is a good defense to the crime of homicide."

3. Intervening cause must be "new and wholly independent" of the original act of the defendant. United States v. Eddy, 26 C.M.R. 718 (A.B.R. 1958) (To constitute an intervening cause to the offense of murder, medical maltreatment must be so grossly erroneous as to constitute a new and independent cause of death.); see also United States v. Gomez, 15 M.J. 594 (A.C.M.R. 1983).

4. The intervening cause must not be foreseeable. In United States v. Varraso, 21 M.J. 129 (C.M.A. 19985), the court held that the defense was not raised where accused helped victim hang herself by tying her hands behind her back and putting her head in the noose. Any later acts by the victim to complete the hanging were foreseeable.

5. Intervening cause must intrude between the original wrongful act or omission and the injury and produce a result which would not otherwise have followed. United States v. King, 4 M.J. 785 (N.C.M.R. 1977). In King, the court held that the defense of intervening cause was not raised in the crime of negligent homicide. Defense offered evidence that the accused drove onto the shoulder of the road to avoid the oncoming victim and that, in attempting to negotiate the sunken shoulder to regain the road, the accused crossed over the center line and struck the victim's vehicle. The court noted that intervening cause would have been present had a third vehicle been involved or had the accused offered evidence that one of the wheels of his vehicle dropped off or that an earthslide forced him into the oncoming lane.

6. Henderson v. Kibbe, 431 U.S. 145 (1977). Abandoning intoxicated robbery victim on an abandoned rural road in a snowstorm established culpability for death of victim resulting from his being struck by a speeding truck.

V. THE DEFENSE OF DURESS.

A. Defined. The defense of duress exists when the accused commits the offense because of a well-grounded apprehension of immediate death or serious bodily harm. R.C.M. 916(h); see generally Lunde & Wilson, Brainwashing as a Defense to Criminal Liability: Patty Hearst Revisited, 13 Crim. L. Bull. 341 (Sept-Oct 1977); United States v. Montford, 13 M.J. 829 (A.C.M.R. 1982). The defense is not applicable to homicide or to valid military orders requiring performance of a dangerous military duty. See United States v. Talty, 17 M.J. 1107 (N.M.C.M.R. 1984).

1. Duress is never a defense to homicide. R.C.M. 916(h); but see Director of Public Prosecutions for Northern Ireland v. Lynch [1975] 1 All E.R. 913 (H.L.) (defense of duress available to aider-abettor who drove I.R.A. getaway car in homicide of a constable).

2. What constitutes reasonable apprehension? Fear sufficient to cause a person of ordinary fortitude and courage to yield. United States v. Logan, 47 C.M.R. 1 (C.M.A. 1973) (reasonable fear did not exist where accused was in Korea and threats to harm his family in CONUS were made by local Korean nationals); United States v. Olson, 22 C.M.R. 250 (C.M.A. 1957) (A prisoner-of-war who wrote anti-American articles while incarcerated was denied the duress instruction at his court-martial for aiding the enemy when the only evidence of coercion brought to bear on him consisted of veiled threats of future possible mistreatment. No evidence indicated that any overt act was taken to execute the threats against accused or that he was ever subjected to any physical mistreatment other than that suffered by the prisoners as a group.); United States v. Palus, 13 M.J. 179 (C.M.A. 1982) (inadequate providency inquiry required reversal where accused in Germany stated he feared for his family's safety when his wife was harassed in Las Vegas about his gambling debts); see generally United States v. Ellerbee, 30 M.J. 517 (A.F.C.M.R 1990) (sufficient to raise duress); United States v. Riofredo, 30 M.J. 1251 (N.M.C.M.R. 1990) (evidence does not raise duress); TJAGSA Practice Note, Duress and Absence Without Authority, The Army Lawyer, Dec. 1990, at 34 (discusses Riofredo).

3. The military apparently does not recognize the rule that one who recklessly or intentionally placed himself in a situation in which it was reasonably foreseeable that he or she would be subjected to coercion is not entitled to the defense of duress. United States v. Jemmings, 50 C.M.R. 247 (A.C.M.R. 1975), rev'd, 1 M.J. 414 (C.M.A. 1976); see also United States v. Vandemark, 14 M.J. 690 (N.M.C.M.R. 1982).

4. The defense requires fear of immediate death or great bodily harm and no reasonable opportunity to avoid committing the harm. See generally United States v. Barnes, 12 M.J. 779 (A.C.M.R. 1981).

a. The accused must not only fear immediate death or great bodily harm but also have no reasonable opportunity to avoid committing the crime. R.C.M. 916(h).

b. The old rule. United States v. Flemming, 23 C.M.R. 7 (C.M.A. 1957) (Even though accused was subjected to great privation as POW, actions of captors did not constitute defense against charge of collaboration with the enemy because accused's resistance had not brought him to the "last ditch.").

c. The new rule. "The immediacy element of the defense is designed to encourage individuals promptly to report threats rather than breaking the law themselves [citation omitted]." United States v. Jemmings, 1 M.J. 414, 418 (C.M.A. 1976) (threat to inflict harm the next day held sufficient to activate defense where accused's company commander had previously refused to assist); see also United States v. Roberts, 14 M.J. 671 (N.M.C.M.R. 1982); United States v. Campfield, 17 M.J. 715 (N.M.C.M.R. 1983).

B. Who Must Be Endangered.

1. The old rule: the accused personally. MCM, 1969, para. 213f.

2. The new rule: any innocent person. R.C.M. 916(h); see United States v. Barnes, 12 M.J. 779 (A.C.M.R. 1981); United States v. Pinkston, 39 C.M.R. 261 (C.M.A. 1969) (threat against fiancee and illegitimate child can raise the defense of duress); United States v. Jemmings, 1 M.J. 414 (C.M.A. 1976) (threat against accused's children can raise the defense of duress).

C. Evidence. Accused's use of the duress defense creates an opportunity for the prosecution to introduce evidence of his other subsequent (and prior?) voluntary crimes in order to rebut the defense. United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977); see also M.R.E. 404(b).

D. The Nexus Requirement.

1. In United States v. Barnes, 12 M.J. 779 (A.C.M.R. 1981), the court stated a nexus between the threat and the crime committed must exist. Thus, duress was not available to an accused who robbed a taxi driver where the threat was only to force payment of a debt. The coercion must be to commit a criminal act.

2. For requirements on instructions, see United States v. Rankins, 32 M.J. 971 (A.C.M.R. 1991).

E. The Military Defense of Necessity.

1. Duress and necessity distinguished. Necessity is a defense of justification; it exculpates a nominally unlawful act to avoid a greater evil. Duress is a defense of excuse; it excuses a threatened or coerced actor. See generally Milhizer, Necessity and the Military Justice System: A Proposed Special Defense, 121 Mil. L. Rev. 95 (188).

2. Duress and necessity are separate affirmative defenses, and the defense of necessity is not recognized in military law. United States v. Banks, 37 M.J. 700 (A.C.M.R. 1993).

3. Necessity has arguably been recognized and applied de facto to the offenses of AWOL and escape from confinement, but always under the name of duress.

a. United States v. Blair, 36 C.M.R. 413 (C.M.A. 1966) (error not to instruct on defense raised by accused's flight from cell to avoid beating by a brig guard).

b. United States v. Pierce, 42 C.M.R. 390 (A.C.M.R. 1970) ("duress" to escape from confinement not raised by defense offer of proof regarding stockade conditions, but lacking a showing of imminent danger).

c. United States v. Guzman, 3 M.J. 740 (N.C.M.R. 1977) (accused with injury that would have been aggravated by duty assignment had no defense of "duress" to crime of AWOL because performing duty would not have caused immediate death or serious bodily injury).

d. In an early case in which a sailor went AWOL because of death threats by a shipmate, the Navy Board of Review held that the defense of duress was not raised. Noting that the accused was never in danger of imminent harm and that the threatener had never demanded that the accused leave his ship, the board concluded that the accused had no right to leave a duty station in order to find a place of greater safety. United States v. Wilson, 30 C.M.R. 630 (N.B.R. 1960).

e. Escapees are not entitled to duress or necessity instructions unless they offer evidence of bona fide efforts to surrender or return to custody once the coercive force of the alleged duress/necessity had dissipated. United States v. Bailey, 444 U.S. 394 (1979); accord United States v. Clark, NCM 79-1948 (N.C.M.R. 30 May 1980) (unpub.).

f. United States v. Roberts, 14 M.J. 671 (N.M.C.M.R. 1982), rev'd, 15 M.J. 106 (C.M.A. 1983) (summary disposition) (duress available to female sailor who went AWOL to avoid shipboard initiation when complaints about harassment went unheeded); see also United States v. Tulin, 14 M.J. 695 (N.M.C.M.R. 1982) (informant felt Navy could no longer protect him); United States v. Hullum, 15 M.J. 261 (C.M.A. 1983) (racial harassment).

g. Note, Medical Necessity as a Defense to Criminal Liability, 46 Geo. Wash. L. Rev. 273 (1978).

VI. THE DEFENSE OF INABILITY/IMPOSSIBILITY--OBSTRUCTED COMPLIANCE.

A. Defined. Generally this defense pertains only to situations in which the accused has an affirmative duty to act and does not. The defense excuses a failure to act.

B. **Physical (Health-Related) Obstructions to Compliance.**

1. Physical impossibility.

a. The accused's conduct is excused if physical conditions made it impossible to obey or involuntarily caused the accused to disobey. See United States v. Williams, 21 M.J. 360 (C.M.A. 1986).

b. When one's physical condition is such as actually to prevent compliance with orders or to cause the commission of an offense, the question is not one of reasonableness but whether the accused's illness was the proximate cause of the crime. The case is not one of balancing refusal and reason, but one of physical impossibility to maintain the strict standards required under military law. In such a situation, the accused is excused from the offense if its commission was directly caused by the physical condition and the question whether the accused acted reasonably does not enter into the matter. United States v. Cooley, 36 C.M.R. 180 (C.M.A. 1966). To apply a reasonableness standard in instructing the court is error. United States v. Liggon, 42 C.M.R. 614 (A.C.M.R. 1970).

c. Physical impossibility may exist as a result of illness/injury of the accused. United States v. Cooley, 36 C.M.R. 180 (C.M.A. 1966) (the defense applied to a charge of sleeping on guard where the accused suffered from narcolepsy resulting in uncontrollable sleeping spells.) The defense also exists when requirements placed on the accused are physically impossible of performance. United States v. Borell, 46 C.M.R. 1108 (A.F.C.M.R. 1973) (discusses the impossibility of obeying an order to report to the orderly room within a very short period of time).

2. Physical Inability.

a. If the accused's noncompliance was reasonable under the circumstances, it is excused.

b. Unlike physical impossibility, inability to act is a matter of degree. To determine whether a soldier's failure to act because of a physical shortcoming constitutes a defense, one must ask whether the non-performance was reasonable in light of the injury, the task imposed, and the pressing nature of circumstances. United States v. Cooley, 36 C.M.R. 180 (C.M.A. 1966).

c. United States v. Amie, 22 C.M.R. 304 (C.M.A. 1957). Inability raised when accused testified that upon expiration of leave he was ill and, pursuant to medical advice, undertook to recuperate at home, thus resulting in late return to unit.

d. United States v. Heims, 12 C.M.R. 174 (C.M.A. 1953). The law officer erred by failing to instruct on the physical inability defense where evidence established that accused was unable to comply with order to tie sandbags because he was suffering from a hand injury.

e. United States v. King, 17 C.M.R. 3 (C.M.A. 1954). Inability defense raised where accused refused order to return to his battle position allegedly because he was suffering from frostbitten feet.

C. Financial and Other Inability.

1. This defense is applicable if the accused can show the following:

a. An extrinsic factor caused noncompliance;

b. The accused had no control over the extrinsic factor;

c. Noncompliance was not due to the fault or design of the accused after he had an obligation to obey; and

d. The extrinsic factor could not be remedied by the accused's timely, legal efforts.

2. United States v. Pinkston, 21 C.M.R. 22 (C.M.A. 1966). Accused not guilty of disobeying order to procure new uniforms when, through no fault of his own, he was financially incapable of purchasing required uniforms.

3. United States v. Smith, 16 M.J. 694 (A.F.C.M.R. 1983). Financial inability is a defense to dishonorable failure to pay a debt.

4. United States v. Kuhn, 28 C.M.R. 715 (C.G.C.M.R. 1959). A seaman who was granted leave to answer charges by civil authorities and who was detained in confinement after the expiration of his leave was not AWOL.

5. United States v. Lee, 16 M.J. 278 (C.M.A. 1983) (collects cases on impossibility and AWOL).

D. Physical Impossibility and Inability and Attempts. Generally physical impossibility and inability does not excuse an attempt. United States v. Powell, 24 M.J. 603 (A.F.C.M.R. 1987); see supra, chapter 1, section I.

VII. THE DEFENSE OF ENTRAPMENT: SUBJECTIVE ENTRAPMENT AND THE DUE PROCESS DEFENSE.

A. Subjective Entrapment: The General Rule. In United States v. Vanzandt, 14 M.J. 332 (C.M.A. 1982) the court set out the two elements of subjective entrapment.

1. The suggestion to commit the crime originated in the government, and

2. The accused had no predisposition to commit the offense.

See generally TJAGSA Practice Note, The Evolving Entrapment Defense, The Army Lawyer, Jan. 1989, at 40.

B. Predisposition to Commit the Crime.

1. An accused who readily accepts the government's first invitation to commit the offense has no defense of entrapment. United States v. Suter, 45 C.M.R. 284 (C.M.A. 1972); United States v. Garcia, 1 M.J. 26 (C.M.A. 1975); United States v. Collins, 17 M.J. 901 (A.C.M.R. 1984); see United States v, Rollins, 28 M.J. 803 (A.C.M.R. 1989); see also United States v. Clark, 28 M.J. 401 (C.M.A. 1989) (accused's hesitancy did not raise entrapment, as it was a result of fearing apprehension rather than a lack of predisposition). United states v. St. Mary, 33 M.J. 836 (A.C.M.R. 1991) (evidence supported finding predisposition where accused procured hashish and sold it to undercover agent within 24 hours of first request.)

2. The government's reasonable suspicion of the accused's criminal activity is immaterial. United States v. Vanzandt, 14 M.J. 332 (C.M.A. 1982); United States v. Gonzalez-Dominicci, 14 M.J. 426 (C.M.A. 1983).

3. To show predisposition the government may introduce subsequent misconduct occurring reasonably contemporaneously with the crime. United States v. Henry, 48 C.M.R. 541 (A.C.M.R. 1974); United States v. Black, 8 M.J. 843 (A.C.M.R. 1980).

4. Some authority suggests that reputation and hearsay evidence may be admissible to show predisposition. See, e.g., United States v. Rocha, 401 F.2d 529 (5th Cir. 1968); United States v. Simon, 488 F.2d 133 (5th Cir. 1973); United States v. Woolf, 594 F.2d 77 (5th Cir. 1979); but see United States v. Cunningham, 529 F.2d 884 (6th Cir. 1976); United States v. Whiting, 295 F.2d 512 (1st Cir. 1961); United States v. McClain, 531 F.2d 431 (9th Cir. 1976); see generally Annot., 61 A.L.R. 3d 293, 314-18 (1975).

5. In a prosecution for possession of a large quantity of hashish for the purpose of trafficking, accused's prior

possession and use of small quantities of hashish was held not to constitute "similar criminal conduct," and did not extinguish the defense of entrapment as to the large quantity. The accused would be found guilty, however, of possessing the lesser amount. United States v. Fredrichs, 49 C.M.R. 765 (A.C.M.R. 1974); see also United States v. Jacobs, 14 M.J. 999 (A.C.M.R. 1983).

6. A valid defense of entrapment to commit the first of a series of crimes is presumed to carry over into the later crimes. United States v. Skrzek, 47 C.M.R. 314 (A.C.M.R. 1973). Whether the presumption carries over to different kinds of drugs is a question of fact. United States v. Jacobs, 14 M.J. 999 (A.C.M.R. 1982). The taint can extend to a different type of crime as long as the acts come from the same inducement. United States v. Bailey, 18 M.J. 749 (A.C.M.R. 1984) (accused entrapped to distribute drugs could raise defense to larceny by trick arising from later distribution of counterfeit drugs).

7. Prior possession or use of drugs does not necessarily establish a predisposition to sell or distribute drugs. United States v. Venus, 15 M.J. 1085 (A.C.M.R. 1983); United States v. Bailey, 18 M.J. 749 (A.C.M.R. 1984).

8. Profit motive does not necessarily negate an entrapment defense. United States v. Eckhoff, 27 M.J. 142 (C.M.A. 1988); United States v. Meyers, 21 M.J. 1007 (A.C.M.R. 1986); United States v. Cortes, 29 M.J. 946 (A.C.M.R. 1990); see TJAGSA Practice Note, Multiple Requests, Profit Motive, and Entrapment, The Army Lawyer, Jun. 1990, at 48 (discusses Cortes).

9. Predisposition is a question of fact. A military judge may not find predisposition as a matter of law and refuse to instruct on entrapment. United States v. Johnson, 17 M.J. 1056 (A.F.C.M.R. 1983).

C. Government Conduct.

1. Profit motive does not necessarily negate entrapment. Eckhoff and Meyers, both supra.

2. Multiple requests by a government agent alone may not raise entrapment. United States v. Sermons, 14 M.J. 350 (C.M.A. 1982).

3. The latitude given the government in "inducing" the criminal act is considerably greater in drug cases than it would be in other kinds of crimes. United States v. Vanzandt, 14 M.J. 332, 344 (C.M.A. 1982).

D. Not Confession and Avoidance. In order for the defense of entrapment to be raised and established, the accused need not admit the crime; indeed, he may deny it. United States v. Garcia,

1 M.J. 26 (C.M.A. 1975); United States v. Williams, 4 M.J. 507, 509 n. 1 (A.C.M.R. 1977).

E. Due Process Defense.

1. Even an individual predisposed to crime may argue entrapment when the conduct of government agents is so outrageous as to violate due process. See generally United States v. West, 511 F.2d 1083 (3rd Cir. 1973).

2. The due process defense is recognized under military law. United States v. Vanzandt, 14 M.J. 332 (C.M.A. 1982); United States v. Simmons, 14 M.J. 634 (A.F.C.M.R. 1982); United States v. Harms, 14 M.J. 677 (A.F.C.M.R. 1982).

3. The due process defense is a question of law for the military judge. United States v. Vanzandt, 14 M.J. 332, 343 n. 11 (C.M.A. 1982).

4. Outrageous government conduct in drug cases will be especially difficult to prove given the greater latitude given government agents in drug cases. United States v. Vanzandt, 14 M.J. 332, 344 n. 14 (C.M.A. 1982).

5. Reverse sting operation does not deprive accused of due process. United States v. Frazier, 30 M.J. 1231 (A.C.M.R. 1990).

6. Police did not violate due process in soliciting the accused's involvement in drug transactions where they had no knowledge of his enrollment in a drug rehabilitation program. United States. v. Cooper, 33 M.J. 356 (C.M.A. 1991).

7. Government conduct did not violate due process where accused provided drugs to undercover female agent in hopes of having a future sexual relationship as the agent did not offer dating or sexual favors as an inducement. United States v. St. Mary, 33 M.J. 836 (A.C.M.R. 1991)

8. Sufficient evidence existed to show accused's predisposition to commit two separate offenses of distribution of cocaine; however, due process entrapment defense was available for drug use offenses where government improperly induced accused, a recovering cocaine addict enrolled in Army rehabilitation program, into using cocaine. United States v. Bell, 38 M.J. 358 (C.M.A. 1993).

9. Court members should be instructed only on subjective entrapment, and not the due process defense. United States v. Dayton, 29 M.J. 6 (C.M.A. 1989).

F. Entrapment Does Not Apply if Carried Out By Foreign Law Enforcement Activities. See United States v. Thompson, CM 440451 (A.C.M.R. 27 April 1982) (unpub.); United States v. Perl, 584 F.2d 1316, 1321 n. 3 (4th Cir. 1978).

VIII. THE DEFENSE OF SELF-DEFENSE.

A. "Preventive Self-Defense" in Which No Injury Is Inflicted. If no battery is committed but the accused's acts constitute assault by offer, the accused may threaten the victim with any degree of force, provided only that the accused honestly and reasonably believes that the victim is about to commit a battery upon him. R.C.M. 916(e)(2). United States v. Acosta-Vargas, 32 C.M.R. 388 (C.M.A. 1962); United States v. Johnson, 25 C.M.R. 554 (A.C.M.R. 1958); United States v. Lett, 9 M.J. 602 (A.F.C.M.R. 1980).

B. The Defense of Self-Defense to Crimes in Which an Injury is Inflicted Upon the Victim. Two separate standards of self-defense exist depending on the nature of the injury inflicted on the victim. United States v. Thomas, 11 M.J. 315 (C.M.A. 1981); United States v. Sawyer, 4 M.J. 64 (C.M.A. 1977); United States v. Jackson, 36 C.M.R. 101 (C.M.A. 1966).

1. R.C.M. 916(e)(1). Standard applied when homicide or aggravated assault is charged -- The accused may justifiably inflict death or grievous bodily harm upon another if:

a. He apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted on him; and

b. He believed that the force he used was necessary to prevent death or grievous bodily harm.

2. R.C.M. 916(e)(3). Standard applied when simple assault or battery is charged -- The accused may justifiably inflict injury short of death or grievous bodily harm if:

a. He apprehended, upon reasonable grounds, that bodily harm was about to be inflicted on him, and

b. He believed that the force he used was necessary to avoid that harm, but that the force actually used was not reasonably likely to result in death or grievous bodily harm.

3. A provoker, aggressor, or one who voluntarily engages in a mutual affray is not entitled to act in self defense unless he first withdraws in good faith and indicates his desire for peace. R.C.M. 916(e)(4). United States v. Brown, 33 C.M.R. 17 (C.M.A. 1963); United States v. O'Neal, 36 C.M.R. 189 (C.M.A. 1966); United States v. Green, 33 C.M.R. 77 (C.M.A. 1963).

4. The accused is not required to retreat when he is at a place where he has a right to be. The presence or absence of an opportunity to withdraw safely, however, may be a factor in deciding whether the accused had a reasonable belief that bodily harm was about to be inflicted upon him. R.C.M. 916(e)(4) (discussion); United States v. Lincoln, 38 C.M.R. 128 (C.M.A. 1967); United States v. Smith, 33 C.M.R. 3 (C.M.A. 1963); United States v. Adams, 18 C.M.R. 187 (C.M.A. 1955).

5. An accused who wrongfully engages in a simple assault and battery may have a right to use deadly force if the victim first uses deadly force upon the accused. United States v. Henry, 40 C.M.R. 818 (A.C.M.R. 1969); United States v. Cardwell, 15 M.J. 124 (C.M.A. 1983); see United States v. Winston, 27 M.J. 618 (A.C.M.R. 1988) (self-defense not raised where the accused aggressively participated in an escalating mutual affray); see TJAGSA Practice Note, Assault and Mutual Affrays, The Army Lawyer, Jul. 1989, at 40 (discusses Cardwell and Winston)..

6. The right to self-defense ceases when the threat is removed. United States v. Rickey, 20 M.J. 251 (C.M.A. 1985).

7. The accused's voluntary intoxication cannot be considered in determining accused's perception of the potential threat which led him to believe that a battery was about to be inflicted, as this is measured objectively. United States v. Judkins, 34 C.M.R. 232 (C.M.A. 1964).

8. Self-defense need not be raised by the accused's testimony, even if he testifies. United States v. Rose, 28 M.J. 132 (C.M.A. 1989); see TJAGSA Practice Note, Self-Defense Need Not Be Raised by the Accused's Testimony, The Army Lawyer, Aug. 1989, at 40 (discusses Rose). See United States v. Reid, 32 M.J. 146 (C.M.A. 1991).

9. The "egg-shell" victim. R.C.M. 916(e)(3) (discussion). If an accused is lawfully acting in self-defense and using less force than is likely to cause death or grievous bodily harm, the death of the victim does not deprive the accused of the defense, if:

a. The accused's use of force was not disproportionate, and

b. The death was unintended, and

c. The death was not a reasonably foreseeable consequence. United States v. Jones, 3 M.J. 279 (C.M.A. 1977); United States v. Perry, 36 C.M.R. 377 (C.M.A. 1966).

IX. DEFENSE OF ANOTHER.

A. Traditional View Adopted by Military. R.C.M. 916(e)(5). One who acts in defense of another has no greater right than the party defended. United States v. Regalado, 33 C.M.R. 12 (C.M.A. 1963); United States v. Hernandez, 19 C.M.R. 822 (A.F.B.R. 1955).

B. "Enlightened View" Rejected. Accused who honestly and reasonably believes he is justified in defending another does not escape criminal liability if the "defended party" is not entitled to the defense of self-defense. United States v. Tanksley, 7 M.J. 573 (A.C.M.R. 1979); United States v. Styron, 21 C.M.R. 579 (C.G.B.R. 1956); but see LaFave & Scott, Criminal Law § 54 at 397-399 (1972); see generally Byler, Defense of Another, Guilt Without Fault?, The Army Lawyer, June 1980.

X. THE DEFENSE OF INTOXICATION.

A. Voluntary Intoxication. R.C.M. 916(l)(2); see generally Milhizer, Voluntary Intoxication as a Criminal Defense Under Military Law, 127 Mil. L. Rev. 131 (1990).

1. Voluntary intoxication is a legitimate defense against an element of premeditation, specific intent, knowledge, or willfulness in any crime---except the element of specific intent in the crime of unpremeditated murder. R.C.M. 916(l)(2); MCM, 1984, Part IV, para. 43c(2)(c); United States v. Ferguson, 38 C.M.R. 239 (C.M.A. 1968); United States v. Morgan, 37 M.J. 407 (C.M.A. 1993). To constitute a valid defense, voluntary intoxication need not deprive the accused of his mental capacities nor substantially deprive him of his mental capacities. Rather, it need only be of such a degree as to create a reasonable doubt that he premeditated or entertained the required intent, knowledge, or willfulness. See generally United States v. Gerston, 15 M.J. 990 (N.M.C.M.R. 1983) and United States v. Ledbetter, 32 M.J. 272 (C.M.A. 1991).

2. Voluntary intoxication is not a defense to crimes involving only a general intent. United States v. Reitz, 47 C.M.R. 608 (N.C.M.R. 1973) (voluntary intoxication no defense to drug sale, transfer, possession).

3. Where there is some evidence of excessive drinking and impairment of accused's faculties, military judge must sua sponte instruct on the defense of voluntary intoxication. United States v. Yandle, 34 M.J. 890, (N.M.C.M.R. 1992). If no evidence of excessive drinking or impairment, military judge is not required to instruct. United States v. Watford, 32 M.J. 176 (C.M.A. 1991).

B. Involuntary Intoxication. An accused is involuntarily intoxicated when he exercises no independent judgment in taking the

intoxicant--as, for example, when he has been made drunk by fraudulent contrivances of others, by accident, or by error of his physician. If the accused's intoxication was involuntary and his capacity for control over his conduct was affected thereby and resulted in the criminal act charged, he should be acquitted. United States v. Munoz-Medrano, CM 427060 (A.C.M.R. 23 February 1973) (unpub.). An accused who voluntarily takes the first drink, knowing from past experience that the natural and reasonably foreseeable consequences of that act will be a violent intoxicating reaction cannot claim that his condition was "involuntary" so as to interpose an affirmative defense. United States v. Schumacher, 11 M.J. 612 (A.C.M.R. 1981); see generally Kaczynski, "I Did What?" The Defense of Involuntary Intoxication, The Army Lawyer, Apr. 1983, at 1.

XI. THE DEFENSE OF MISTAKEN BELIEF OR IGNORANCE.

A. Degrees of Mistake or Ignorance of Fact.

1. An honest (subjective) mistake of fact or ignorance is generally a defense to crimes requiring premeditation, specific intent, knowledge, or willfulness. For example, an accused's honest belief that he had permission to take certain property would excuse the crime of larceny or wrongful appropriation. R.C.M. 916(j). United States v. Turner, 27 M.J. 316 (C.M.A. 1988) (honest mistake a defense to larceny); see TJAGSA Practice Note, Recent Applications of the Mistake of Fact Defense, The Army Lawyer, Feb. 1989, at 66 (discusses Turner); United States v. Hill, 32 C.M.R. 158 (C.M.A. 1962) (honest belief owner gave permission to use car a good defense to wrongful appropriation); see also United States v. Jett, 14 M.J. 941 (A.C.M.R. 1982). Similarly, an honest mistake can be a defense to presenting a false claim, United States v. Graves, 23 M.J. 374 (C.M.A. 1987); United States v. Ward, 16 M.J. 341 (C.M.A. 1983), and false official statement. United States v. Oglivie, 29 M.J. 1069 (A.C.M.R. 1990).

2. An honest and reasonable (objective) mistake of fact or ignorance is generally a defense to crimes lacking an element of premeditation, specific intent, knowledge or willfulness. R.C.M. 916(j). United States v. Brown, 22 M.J. 448 (C.M.A. 1986); United States v. Graham, 3 M.J. 962 (N.C.M.R. 1977) (accused's honest and reasonable mistaken belief he had permission to be gone held a legitimate defense to AWOL); United States v. Jenkins, 47 C.M.R. 120 (C.M.A. 1973) (accused's honest and reasonable belief he had a "permanent profile" held a legitimate defense to disobedience of a general regulation requiring shaving); United States v. Oglivie, 29 M.J. 1069 (A.C.M.R. 1990) (an honest and reasonable mistake is required for a defense to the general intent crime of bigamy); United States v. Barnard, 32 M.J. 530 (A.F.C.M.R. 1990) (an honest and reasonable mistake is required for a defense to general intent crime of dishonorable failure to maintain

sufficient funds); United States v. McMonagle, 38 M.J. 53 (C.M.A. 1993) (mistake of fact can rebut state of mind required for depraved-heart murder and can negate element of unlawfulness and thus, killing was justified if accused honestly and reasonably thought that he was shooting at a combatant).

3. Certain offenses such as bad checks and dishonorable failure to pay debts require a special degree of prudence and the mistake and ignorance standards must be adjusted accordingly. For example, in UCMJ art. 134 check offenses the accused's ignorance or mistake to be exonerating must not have been the result of bad faith or gross indifference. United States v. Barnard, supra.

4. Some offenses, like carnal knowledge, have strict liability elements. See Milhizer, Mistake of Fact and Carnal Knowledge, The Army Lawyer, Oct. 1990, at 4. Deliberate ignorance can create criminal liability. United States v, Dougal, 32 M.J. 863 (N.M.C.M.R. 1991).

B. Result of Mistaken Belief. To be a successful defense, the mistaken belief must be one which would, if true, exonerate the accused. United States v. Vega, 29 M.J. 892 (A.F.C.M.R. 1989) (no defense where the accused believed he possessed marijuana rather than cocaine); United States v. Fell, 33 M.J. 628 (A.C.M.R. 1991) (against a charge of robbery, the accused's honest belief that the money was his is a legitimate defense to robbery of the money, though not a shield against conviction for assault on the victim); United States v. Coker, 2 M.J. 304 (A.F.C.M.R. 1976) (no defense to drug sale that accused believed that the drug he sold was a contraband substance other than that which he actually sold and was charged with); United States v. Anderson, 46 C.M.R. 1073 (A.F.C.M.R. 1973) (accused charged with LSD offense has no defense because he believed the substance to be mescaline); United States v. Calley, 46 C.M.R. 1131, 1179 (A.C.M.R. 1973) (no defense to homicide that accused believed victims were detained PWs rather than noncombatants); United States v. Jefferson, 13 M.J. 779 (A.C.M.R. 1982) (mistake not exonerating where accused accepted heroin thinking it was hashish); United States v. Myles, 31 M.J. 7 (C.M.A. 1990) (mistake as to type of controlled substance is not exculpatory); see TJAGSA Practice Note, Mistake of Drug is Not Exculpatory, The Army Lawyer, Dec. 1990, at 36 (discusses Myles); see generally United States v. Mance, 26 M.J. 244 (C.M.A. 1988).

C. The Defense of Mistake or Ignorance to Crimes of Possession of Contraband. See discussion supra, chapter 4, Drugs.

D. Mistake of Fact in Sex Cases.

1. An honest and reasonable mistake of fact as to consent is a defense in rape cases. United States v. Taylor, 20 M.J. 127 (C.M.A. 1988); United States v. Baran, 22 M.J. 265 (C.M.A. 1986); United States v. Carr, 18 M.J. 297 (C.M.A. 1984); United

States v. Davis, 27 M.J. 543 (A.C.M.R. 1988); see TJAGSA Practice Note, Recent Applications of the Mistake of Fact Defense, The Army Lawyer, Feb. 1989, at 66 (discusses Davis); see also United States v. Daniels, 28 M.J. 743 (A.F.C.M.R. 1989) (discusses sufficiency of evidence to raise the defense).

2. An honest and reasonable mistake of fact as to the age of sexual partner is not a defense to carnal knowledge, but mistake as to identity of partner can be (accused claimed that he thought his 15-year-old partner was his wife). United States v. Adams, 33 M.J. 300 (C.M.A. 1991).

3. Even though indecent assault is a specific intent crime, a mistake of fact as to the victim's consent must be both honest and reasonable as the defense goes to the victim's intent and not the accused's intent. United States v. Johnson, 25 M.J. 691 (A.C.M.R. 1987); United States v. McFarlin, 19 M.J. 790 (A.C.M.R. 1985); Compare this with assault with intent to commit rape, a specific intent crime, where a mistake of fact as to victim's consent need only be honest. United States v. Langley, 33 M.J. 278 (C.M.A. 1991). See also United States v. Apilado, 34 M.J. 773 (A.C.M.R. 1992).

4. Accused not required to take stand to raise defense of mistake of fact. United States v. Sellers, 33 M.J. 364 (C.M.A. 1991).

E. Mistake of Law.

1. Ordinarily, mistake of law is not a defense. R.C.M. 916(l)(1). United States v. Bishop, 2 M.J. 741 (A.F.C.M.R. 1977) (accused's belief that under state law he could carry a concealed weapon not a defense to carrying a concealed weapon on base in violation of UCMJ art. 134).

2. Under some circumstances, however, a mistake of law may negate a criminal intent or a state of mind necessary for an offense. R.C.M. 916(l)(1) discussion.

a. A mistake as to a separate, nonpenal law may exonerate. See United States v. Sicley, 20 C.M.R. 118 (C.M.A. 1955) (honest mistake of fact as to claim of right under property law negates criminal intent in larceny); United States v. Ward, 16 M.J. 341 (C.M.A. 1983) (honest mistake defense to presenting a false claim).

b. Reliance on decisions and pronouncements of authorized public officials and agencies may be a defense, although reliance on counsel's advice would not be. R.C.M. 916(l)(1) (discussion); R. Perkins and M. Boyce, Criminal Law 1041, 1043 (3rd ed. 1982); cf. United States v. Lawton, 19 M.J. 886 (A.C.M.R. 1985) (behavior after obtaining lawyer's opinion that married at common

law, inter alia, sufficient to raise mistake defense).

F. Special Evidentiary Rule. M.R.E. 404(b) allows the prosecution to present evidence of uncharged crimes, wrongs, or acts committed by the accused in order to show the absence of a mistake. This is particularly important because such extrinsic evidence may be admitted even though the accused does not testify on his own behalf. See United States v. Beechum, 582 F.2d 898 (5th cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). Before such evidence will be admitted, however, it must be tested against the criteria of M.R.E. 403. See United States v. Janis, 1 M.J. 395 (C.M.A. 1976).

XII. DEFENSES OF JUSTIFICATION.

A. Protection of Property.

1. Use of non-deadly force. Reasonable, non-deadly force may be used to protect personal property from trespass or theft. United States v. Regalado, 33 C.M.R. 12 (C.M.A. 1963) (one lawfully in charge of premises may use reasonable force to eject another, if the other has refused an oral request to leave and a reasonable time to depart has been allowed); United States v. Hines, 21 C.M.R. 201 (C.M.A. 1956) (with regard to on-post quarters, commander on military business is not a trespasser subject to accused's right to eject); United States v. Gordon, 33 C.M.R. 489 (A.B.R. 1963) (the necessity to use force in defense of personal property need not be real, but only reasonably apparent); United States v. Wilson, 7 M.J. 997 (A.C.M.R. 1979) (accused had no right to resist execution of a search warrant, even though warrant subsequently held to be invalid); United States v. Adams, 18 C.M.R. 187 (C.M.A. 1955) ("Generally a military person's place of abode is the place where he bunks and keeps his private possessions. His home is the particular place where the necessities of the service force him to live. This may be a barracks, a tent, or even a fox hole. Whatever the name of his place of abode, it is his sanctuary from unlawful intrusion and he is entitled to stand, his ground, against a trespasser, to the same extent that a civilian is entitled to stand fast in his civilian home."); see also United States v. Lincoln, 38 C.M.R. 128 (C.M.A. 1967); see generally Peck, The Use of Force to Protect Government Property, 26 Mil. L. Rev. 81 (1964).

2. Use of deadly force. Deadly force may be employed to protect property only if (1) the crime is of a forceful, serious or aggravated nature, and (2) the accused honestly believes use of deadly force is necessary to prevent loss of the property. United States v. Lee, 13 C.M.R. 57 (C.M.A. 1953).

B. Prevention of Crime.

1. Under military law a private person may use force essential to prevent commission of a felony in his presence, although the degree of force should not exceed that demanded by the circumstances. United States v. Hamilton, 27 C.M.R. 204 (C.M.A. 1959); see generally Peck, The Use of Force to Protect Government Property, 26 Mil. L. Rev. 81 (1964). While felony is not defined in the 1984 Manual for Courts-Martial, 18 U.S.C. § 1(1) (1982) defines it as any offense punishable by death or imprisonment for a term exceeding one year.

2. Use of deadly force. United States v. Pearson, 7 C.M.R. 298 (A.B.R. 1953) (soldier on combat patrol justified in killing unknown attacker of another patrol member where (1) victim was committing a felony in the accused's presence, and (2) the accused attempted to inflict less than deadly force).

C. Performance of Duty. A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful. R.C.M. 916(c).

D. Obedience to Orders.

1. Orders of military superiors are inferred to be legal. MCM, 1984, Part IV, para. 14c(2)(a); United States v. Cherry, 22 M.J. 284 (C.M.A. 1986).

2. The accused is entitled to the defense where he committed the act pursuant to an order which (a) appeared legal and which (b) the accused did not know to be illegal. R.C.M. 916(d); United States v. Calley, 46 C.M.R. 1131, 1183 (A.C.M.R. 1973).

a. Accused's actual knowledge of illegality required. United States v. Whatley, 20 C.M.R. 614 (A.F.B.R. 1955) (where superior ordered accused to violate a general regulation, the defense of obedience to orders will prevail unless the evidence shows not only that the accused had actual knowledge that the order was contrary to the regulation but, also, that he could not have reasonably believed that the superior's order may have been valid).

b. Defense unavailable if man of ordinary sense and understanding would know the order to be unlawful. United States v. Griffen, 39 C.M.R. 586 (A.B.R. 1968) (no error to refuse request for instruction on defense where accused shot PW pursuant to a superior's order); see United States v. Calley, 46 C.M.R. 1131 (A.C.M.R. 1973) (instruction on obedience to orders given).

E. The Right to Resist Restraint.

1. Illegal confinement. "Escape" is from lawful confinement only; if the confinement itself was illegal, then no

escape. MCM, 1984, Part IV, para. 19c(1)(e); United States v. Gray, 20 C.M.R. 331 (C.M.A. 1956) (no crime to escape from confinement where accused's incarceration was contrary to orders of a superior commander).

2. Illegal apprehension/arrest. An individual is not guilty of having resisted apprehension (UCMJ art. 95) if that apprehension was illegal. United States v. Clark, 37 C.M.R. 621 (A.B.R. 1967) (accused physically detained by private citizen for satisfaction of a debt may, under the standards of self-defense, forcefully resist and seek to escape); United States v. Rozier, 1 M.J. 469 (C.M.A. 1976) (by forcibly detaining accused immediately following his illegal apprehension, NCOs involved acted beyond scope of their offices); United States v. Lewis, 7 M.J. 348 (C.M.A. 1979) (accused cannot assert illegality of apprehension as defense to assault charge when apprehending official acted within the scope of his office); United States v. Noble, 2 M.J. 672 (A.F.C.M.R. 1976) (accused may resist apprehension if he has no "reason to believe" the person apprehending him is empowered to do so); United States v. Braloski, 50 C.M.R. 310 (A.C.M.R. 1975) (resisting apprehension by a German policeman is not an offense cognizable under UCMJ art. 95, but must be charged under UCMJ art. 134).

F. Parental Discipline.

1. The law has clearly recognized the right of a parent to discipline a minor child by means of moderate punishment. United States v. Scofield, 33 M.J. 857 (A.C.M.R. 1991).

2. The use of force by parents or guardians is justifiable if:

a. the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and

b. the force is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation. United States v. Brown, 26 M.J. 148 (C.M.A. 1988).

c. A parent who spanks a child with a leather belt using reasonable force and thereby unintentionally leaves welts or bruises nevertheless acts lawfully so long as the parent acted with a bona fide parental purpose. United States v. Scofield, supra.

3. One acting in the capacity of parent is justified in spanking a child, but the disciplining must be done in good faith for correction of the child motivated by educational purpose and not for some malevolent motive. United States v. Proctor, 34 M.J. 549 (A.F.C.M.R. 1991).

4. Tying stepson's hands and legs and placing a plastic bag over his head went beyond use of reasonable or moderate force allowed in parental discipline. United States v. Gowadia, 34 M.J. 714 (A.C.M.R. 1992).

5. Other recent cases. United States v. Robertson, 36 M.J. 190 (C.M.A. 1992); United States v. Ziots, 36 M.J. 1007 (A.C.M.R. 1993).

6. Accused who admitted striking his child out of frustration and as means of punishment and who made no claim that he honestly believed that force used was not such as would cause extreme pain, disfigurement, or serious bodily injury was not entitled to instruction on parental discipline defense. United States v. Gooden, 37 M.J. 1055 (N.M.C.M.R. 1993).

XIII. ALIBI.

A. Not an Affirmative Defense. R.C.M. 916(a) discussion.

B. Notice Required. R.C.M. 701(b)(1). Exclusion of alibi evidence because of lack of notice is a drastic remedy to be employed only after considering the disadvantage to opposing counsel and the reason for failing to provide notice. United States v. Townsend, 23 M.J. 844 (A.F.C.M.R. 1987).
Military judge abused his discretion when he excluded defense testimony because R.C.M 701(b)(1) notice requirements were not met. United States v. Preuss, 34 M.J. 688 (N.M.C.M.R. 1991).

C. Raised by Evidence. Alibi raised when some evidence shows that the accused was elsewhere at the time of the commission of a crime.

D. Instructions.

1. Military judge is under no sua sponte obligation to instruct on this theory of defense. United States v. Boyd, 17 M.J. 562 (A.F.C.M.R. 1983); United States v. Bigger, 8 C.M.R. 97 (C.M.A. 1953); United States v. Wright, 48 C.M.R. 297 (A.F.C.M.R. 1974).

2. When defense is raised by the evidence and accused requests an instruction, failure to instruct is error. United States v. Moore, 35 C.M.R. 317 (C.M.A. 1965); United States v. Jones, 7 M.J. 441 (C.M.A. 1979).

E. Sufficiency. If alibi raises a reasonable doubt as to guilt, the accused is entitled to an acquittal. United States v. Stafford, 22 M.J. 825 (N.M.C.M.R. 1986).

XIV. AMNESIA.

A. General. Inability to recall past events or the facts of one's identity is loosely described as amnesia. An accused who suffers from amnesia at the time of the trial is at a disadvantage. Failure to recall a past event may prevent the accused from disclaiming the possession of a particular intent, the existence of which is essential for conviction of the offenses charged. Similarly, inability to recall identity can prevent the accused from obtaining evidence of good character from friends and family. Amnesia, however, is, by itself, generally "a relatively neutral circumstance in its bearing on criminal responsibility." United States v. Olvera, 15 C.M.R. 134 (C.M.A. 1954); see generally United States v. Boultinghouse, 29 C.M.R. 537 (C.M.A. 1960); United States v. Buran, 23 M.J. 736 (A.F.C.M.R. 1986).

B. When Amnesia May be a Defense.

1. Military offenses requiring knowledge of accused's status as a service person.

a. Inability to recall identity might include loss of awareness of being a member of the armed forces; in that situation, amnesia might be a defense to a charge of failing to obey an order given before the onset of the condition, as it would show the existence of a mental state which would serve to negate criminal responsibility. United States v. Olvera, supra.

b. An accused cannot be convicted of AWOL if he was temporarily without knowledge that he was in the military during the period of his alleged absence. United States v. Wiseman, 30 C.M.R. 724 (N.B.R. 1961).

2. Drug/alcohol induced amnesia.

a. Lack of memory or amnesia resulting from drugs or alcohol has never constituted a complete defense. United States v. Luebs, 43 C.M.R. 315 (C.M.A. 1971); United States v. Butler, 43 C.M.R. 87 (C.M.A. 1971); United States v. Day, 33 C.M.R. 398 (C.M.A. 1963).

b. Drug/alcohol induced amnesia in and of itself does not constitute a mental disease or defect which will excuse criminal conduct under the defense of lack of mental responsibility. United States v. Olvera, supra; United States v. Lopez-Malave, 15 C.M.R. 341 (C.M.A. 1954).

c. Under earlier law, in order to require an insanity instruction, the evidence must show that accused's alcoholism constitutes a mental disease or defect so as to impair substantially his capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

United States v. Frederick, 3 M.J. 230 (C.M.A. 1977); United States v. Brown, 50 C.M.R. 374 (N.C.M.R. 1975); United States v. Marriott, 15 C.M.R. 390 (C.M.A. 1954). With the passage of UCMJ art. 50a, the standard for lack of mental responsibility is now complete impairment.

C. Amnesia as Affecting Accused's Competency to Stand Trial.

1. The virtually unanimous weight of authority is that an accused is not incompetent to stand trial simply because he is suffering from amnesia. Thomas v. State, 201 Tenn. 645, 301 S.W.2d 358 (1957); Commonwealth v. Hubbard, 371 Mass. 160 (1976).

2. The appropriate test when amnesia is found is whether an accused can receive, or has received, a fair trial. The test, as stated in Dusky v. United States, 362 U.S. 402 (1960), is "whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him."

3. The problem when the accused suffers from amnesia is not his ability to consult with his attorney but rather his inability to recall events during a crucial period.

4. Where the amnesia appears to be temporary, an appropriate solution might be to defer trial for a reasonable period to see if the accused's memory improves.

5. Where the amnesia is apparently permanent, the fairness of proceeding to trial must be assessed on the basis of the particular circumstances of the case. A variety of factors may be significant in determining whether the trial shall proceed, to include:

a. the nature of the crime,

b. the extent to which the prosecution makes a full disclosure of its case and circumstances known to it,

c. the degree to which the evidence establishes the accused's guilt,

d. the likelihood that an alibi or some defense could be established but for the amnesia,

e. the extent and effect of the accused's amnesia.

See Commonwealth v. Lombardi, 25 Cr.L. 2483 (Sept. 5, 1979).

6. A pretrial determination of whether the accused's amnesia will deny him a fair trial is not always possible. In such

a case, the trial judge may make a determination of fairness after trial with appropriate findings of fact and rulings concerning the relevant criteria.

D. Guilty Pleas. An accused who fails to recall the factual basis of the offenses but is satisfied from the evidence that he is guilty may plead guilty. United States v. Luebs, 43 C.M.R. 315 (C.M.A. 1971); United States v. Butler, 43 C.M.R. 87 (C.M.A. 1971).

XV. AUTOMATISM (Unconsciousness).

A. Explanation.

1. Seizures attendant to epilepsy may render the accused unable to form the mens rea required for assault. United States v. Rooks, 29 M.J. 291 (C.M.A. 1989); see generally TJAGSA Practice Note, Epileptic Seizures and Criminal Mens Rea, The Army Lawyer, Feb. 1990, at 65 (discusses Rooks).

2. Evidence was sufficient to convict accused of offenses of willfully disobeying and assaulting an NCO, notwithstanding accused's contention that he lacked required mens rea due to automatic and uncontrollable behavior brought on by claustrophobia. United States v. Campos, 37 M.J. 894 (A.C.M.R. 1993).

3. For an interesting survey of the law in this area, see Michael J. Davidson & Steve Walters, United States v. Berri: The Automatism Defense Rears Its Ugly Little Head, Army Law., Oct. 1993, at 17.

CHAPTER 6

MENTAL CAPACITY AND RESPONSIBILITY

I. DEFINITION.

A. Mental Capacity. This relates to the present ability of the accused to stand trial.

B. Mental Responsibility. This relates to the criminal culpability of the accused based on his mental state at the time of the offense and includes the complete defense commonly known as the "insanity defense" and the more limited defense of "partial mental responsibility."

C. Contrasted. Each of the above two areas focuses on a different relevant time and presents a completely separate analytical question. United States v. Lopez-Malave, 15 C.M.R. 341 (C.M.A. 1954).

II. MENTAL CAPACITY. R.C.M. 909.

A. Rule. No person should be brought to trial unless he possesses sufficient mental capacity:

1. To understand the nature of the proceedings against him, and

2. To conduct or cooperate intelligently in his defense. R.C.M. 909(c)(2).

B. Source. Adopted from 18 U.S.C. § 4241(d).

C. Standard. The accused must suffer from a mental disease or defect that renders him or her mentally incompetent to understand the nature of the proceedings or to conduct or cooperate intelligently in his or her defense of the case.

D. Relationship to Amnesia. Amnesia is not equivalent to a lack of capacity. See United States v. Lee, 22 M.J. 767 (A.F.C.M.R. 1986).

E. Procedure.

1. The issue of mental capacity is handled as an interlocutory question ruled on by the military judge. R.C.M. 909(c)(1).

2. The defense bears the burden of proving mental incapacity by a preponderance of the evidence. R.C.M. 909(c)(2).

3. A lack of mental capacity does not require dismissal of charges. Ordinarily the remedy is a continuance or suspension of the proceedings until the accused gains the capacity to stand trial. R.C.M. 909(c)(2) discussion.

III. MENTAL RESPONSIBILITY. Mental condition at the time of the offense.

A. Historical Background.

1. Prior to United States v. Frederick, 3 M.J. 230 (C.M.A. 1977), the Manual for Courts-Martial standard combined the M'Naghten and irresistible impulse tests.

a. The M'Naghten test, developed in 1843, dealt solely with the cognitive component of the mental process:

At the time of committing the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, then that he did not know what he was doing was wrong.

b. The irresistible impulse test, adopted in United States v. Davis, 160 U.S. 469 (1895), added a volitional component:

"Though conscious of the nature of the act and able to distinguish between right and wrong, and knowing that the act is wrong, yet his will . . . has been, otherwise then voluntary, so completely destroyed that his actions are not subject to it but are beyond his control."

c. The Manual for Courts-Martial, 1969 (Rev. ed.), established a combined test which provided that a person was not mentally responsible in a criminal sense unless he was, at the time of the offense, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong, and to adhere to the right.

(1) This test required a complete deprivation of mental faculties. United States v. Collier, 49 C.M.R. 719 (A.F.C.M.R. 1975).

(2) "Mental disease, defect, or derangement" contemplated an irrational state of mind, not an impairment of character. United States v. Lloyd, 48 C.M.R. 979 (A.C.M.R. 1974).

B. Former Military Standard. R.C.M. 916(k).

1. In 1977, the Court of Military Appeals rejected the Manual standard because the majority of federal circuits had adopted the definition of insanity recommended by the American Law Institute (ALI). The court held that the standard for determining mental responsibility was a matter of substantive law beyond the scope of the President's rule-making powers. United States v. Frederick, 3 M.J. 230 (C.M.A. 1977).

2. The former standard provided that:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

a. The former standard employed both a cognitive and volitional test.

b. Unlike the MCM, 1969, standard, the ALI test does not require a complete impairment of the mental faculties. It is a test of "substantial" or "great" impairment. See Model Penal Code § 4.01 (Proposed Official Draft, Comment 4, (1962)); DA Pam 27-9, para. 6-4.

3. Requirement for "mental disease or defect".

a. The existence of a "mental disease or defect" was a threshold requirement before any finding of insanity could be made. United States v. George, 6 M.J. 880 (A.C.M.R. 1979); United States v. Farmer, 6 M.J. 897 (A.C.M.R. 1979).

b. The former military test provided that "mental disease or defect" did not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct. The ALI did not further define the term. United States v. Frederick, 3 M.J. 230 (C.M.A. 1977).

c. The Army Court of Review defined "mental disease or defect" in United States v. Cortes-Crespo, 9 M.J. 717 (A.C.M.R. 1980), affirmed, 13 M.J. 420 (C.M.A. 1982) as follows:

Any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls and are the result of deterioration, destruction, malfunction, or nonexistence of the mental, as distinguished from the moral faculties. The term "behavior controls" refers to the processes and capacity of a person to regulate and control his conduct and his actions. A "mental disease" is distinguished from a "mental defect" in that the former condition is considered capable of either improving or deteriorating, while a "mental

defect" exists when there is present a condition not capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease. The terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

d. The Court of Military Appeals indicated it could not further define "mental disease or defect" beyond the use of the terms themselves. United States v. Cortes-Crespo, 13 M.J. 420 (C.M.A. 1982).

e. Both the Army Court of Military Review and the Court of Military Appeals declined the opportunity to adopt the McDonald definition ("any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior control"). See McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962); United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (McDonald definition adopted in the D.C. Circuit).

f. In United States v. Walker, 14 M.J. 824 (A.C.M.R. 1982) the Army Court of Review refused to require the McDonald instruction and held that the trial judge need not further define "mental disease or defect". The medical experts were permitted to express their medical diagnosis, define their medical terms, and describe the factual basis for their opinion (that the accused had an avoidant personality disorder). The fact finders then performed their task of deciding whether the diagnosis constituted a legal "mental disease or defect".

C. Current Military Standard. Insanity Defense Reform Act Standard - UCMJ art. 50a.

1. UCMJ art. 50a provides: It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

2. The new standard is applicable to all offenses committed on or after 14 November 1986.

a. It is taken from Insanity Defense Reform Act, 18 U.S.C. § 17.

b. It is a rule of substantive law and thus cannot be applied retroactively. United States v. Samuels, 801 F.2d 1052 (8th Cir. 1986).

3. Significant changes to the old standard under R.C.M. 916(k).

a. It establishes a new threshold: severe mental disease or defect (not a minor disorder such as a nonpsychotic behavior disorder or personality defect).

b. It establishes a test of complete impairment.

c. It eliminates volitional prong. See United States v. Rosenheiner, 807 F.2d 107 (7th Cir. 1986).

d. It requires that the accused is unable to appreciate the "wrongfulness" of his acts, rather than the "criminality" of his acts as under the old standard.

4. Procedural ramifications.

a. Burden of proof on the defense is by clear and convincing evidence. United States v. Massey, 27 M.J. 371 (C.M.A. 1989); see generally United States v. Amos, 803 F.2d 419 (8th Cir. 1986); United States v. Freeman, 804 F.2d 1574 (11th Cir. 1986). See Martin v. Ohio, 107 S. Ct. 1098 (1987).

b. Bifurcated voting procedures are required. UCMJ art. 50(e).

(1) First vote on guilt/innocence.

(2) Second vote on mental responsibility if the accused is found guilty.

c. Not guilty only by reason of lack of mental responsibility is now a possible verdict. UCMJ art. 50a(d).

5. Requirement for "severe" mental disease or defect.

a. The existence of a "severe" mental disease or defect is a threshold requirement before any finding of insanity can be made. Cf. United States v. George, 6 M.J. 880 (A.C.M.R. 1979); United States v. Farmer, 6 M.J. 897 (A.C.M.R. 1979).

b. What constitutes a "severe" mental disease or defect? UCMJ art. 50a provides no definitional guidance. The legislation's intent was to ensure that only serious mental disorders supported the insanity defense.

c. A "severe" mental disease or defect does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct. R.C.M. 706(c)(2)(a); cf. United States v. Frederick, 3 M.J. 230 (C.M.A. 1977).

d. A severe mental disease or defect does not include nonpsychotic behavior and personality defects. R.C.M. 706(c)(2)(a).

e. A psychosis is not required for a "severe mental disease or defect." United States v. Benedict, 27 M.J. 253 (C.M.A. 1988).

f. Pathological gambling is not a mental disease or defect. Cf. United States v. Baasel, 22 M.J. 505 (A.F.C.M.R. 1986).

g. As noted, the Court of Military Appeals indicated it could not further define "mental disease or defect" beyond the use of the terms themselves. United States v. Cortes-Crespo, 13 M.J. 420 (C.M.A. 1982).

IV. CONDITIONS NOT AMOUNTING TO A GENERAL LACK OF MENTAL RESPONSIBILITY.

A. Partial Mental Responsibility. R.C.M. 916(k)(2).

1. Former standard.

a. A mental condition, not amounting to a general lack of mental responsibility, which produces a lack of mental ability, at the time of the offense, to possess actual knowledge, or to entertain a specific intent or a premeditated design to kill, is a defense to an offense having one of these states of mind as an element.

b. A "substantial impairment" was required. See United States v. Frederick, supra.

c. Homicide. The defense of partial mental responsibility will permit a conviction of no greater degree of homicide than involuntary manslaughter. See United States v. Vaughn, 49 C.M.R. 747 (C.M.A. 1975); see also United States v. Frederick, supra.

2. New standard.

a. A mental condition not amounting to a general lack of mental responsibility under subsection (k)(1) is not a defense, nor is evidence of such a mental condition admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense.

b. The Court of Military Appeals rejects the Manual standard. Psychiatric testimony or evidence that serves to negate a specific intent is admissible. Ellis v. Jacob, 26 M.J. 909 (C.M.A. 1988); accord United States v. Berri, 33 M.J. 337 (C.M.A. 1991); United States v. Tarver, 29 M.J. 605 (A.C.M.R. 1989). Is all psychiatric evidence now admissible? No, as it still must be relevant and permitted by UCMJ art. 50a.

(1) In a general intent crime, the psychiatric evidence must still rise to the level of a "severe mental disease or defect." The insanity defense cannot be resurrected under another guise. UCMJ art. 50a.

(2) In a specific intent crime, the psychiatric evidence must be relevant to the mens rea element. Cf. United States v. Dibb, 26 M.J. 830 (A.C.M.R. 1988).

B. Intoxication.

1. Voluntary Intoxication. See generally Milhizer, Voluntary Intoxication as a Criminal Defense Under Military Law, 127 Mil. L. Rev. 131 (1990). Voluntary intoxication (by drugs or alcohol) not amounting to delirium tremens does not raise the issue of insanity. United States v. Hernandez, 43 C.M.R. 59 (C.M.A. 1970); United States v. Reitz, 47 C.M.R. 608 (N.C.M.R. 1973).

a. Even when combined with an existing mental condition, voluntary intoxication does not raise an issue of insanity if the mental condition alone is insufficient to raise such an issue. The consistent use of an intoxicant, however, can itself cause a mental disease. United States v. Thomson, 3 M.J. 271 (C.M.A. 1977); United States v. Triplett, 45 C.M.R. 271 (C.M.A. 1972); United States v. Hernandez, 43 C.M.R. 59 (C.M.A. 1970); United States v. Marriott, 15 C.M.R. 390 (C.M.A. 1954).

b. Voluntary intoxication may negate a specific intent, actual knowledge, willfulness, or a premeditated design to kill. Unlike partial mental responsibility, voluntary intoxication will only reduce premeditated murder to unpremeditated murder and not to manslaughter or another lesser offense. United States v. Hernandez, 43 C.M.R. 59 (C.M.A. 1970).

c. Mere intoxication is insufficient. United States v. Box, 28 M.J. 584 (A.C.M.R. 1989); see United States v. Langley, 29 M.J. 1015 (A.C.M.R. 1990).

d. The denial of the defense of voluntary intoxication in cases of unpremeditated murder is a recognition of the need for stronger community safeguards when dealing with the crime of homicide. United States v. Trower, 2 M.J. 492 (A.C.M.R. 1976).

2. Involuntary Intoxication. Intoxication which is not self-induced and results in a lack of substantial capacity to appreciate criminality or conform conduct to the requirements of the law is a defense. See Model Penal Code § 2.08(4) (Proposed Official Draft, 1962). To exculpate the accused, the court must find both that his intoxication was involuntary and that the resulting mental condition equated with the prevailing legal standard of insanity. United States v. Schumacher, 11 M.J. 612 (A.C.M.R. 1981).

3. Pathological Intoxication.

a. The Model Penal Code § 2.08(5)(c) defines pathological intoxication as "intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible", and which serves to exonerate the accused from all responsibility for any criminal act. The "intoxication" is treated as a mental disease or defect in applying the ALI/Frederick mental responsibility test.

b. No military court has expressly adopted pathological intoxication although at least one court has indicated that military law might be expanded to include it as a defense. United States v. Santiago-Vargas, 5 M.J. 41 (C.M.A. 1978).

c. The Navy-Marine Court of Military Review specifically refused to expand military law to include pathological intoxication. United States v. Gertson, 15 M.J. 990 (N.M.C.M.R. 1983).

C. Personality, Character, or Behavior Disorders.

1. A personality, character, or behavior disorder of a type and severity that causes a lack of mental ability to premeditate, entertain a specific intent, or have actual knowledge is a defense to an offense having one of these states of mind as an element. United States v. Storey, 25 C.M.R. 424 (C.M.A. 1958); United States v. Dunnahoe, 21 C.M.R. 67 (C.M.A. 1556); DA Pam 27-9, para. 6-7.

2. A mental condition diagnosed in medical terminology as a personality disorder arguably can constitute a legal "mental disease or defect" and support an insanity defense. United States v. Walker, 14 M.J. 824 (A.C.M.R. 1982).

D. Extenuation and Mitigation. Evidence of the accused's mental condition can be used on sentencing. United States v. Bono, 26 M.J. 240 (C.M.A. 1988).

V. PROCEDURAL CONSIDERATIONS. R.C.M. 706.

A. Pretrial.

1. If there is reason to believe that an accused is insane, or was insane at the time of the offense, the defense counsel, the trial counsel, the commanding officer, or any investigating officer should report the matter to the officer authorized to order an inquiry. R.C.M. 706(a).

2. Defense counsel's request for a sanity board which is made in good faith and is not frivolous should be granted. United States v. Kish, 20 M.J. 652 (A.C.M.R. 1985); however, adequate substitutes for a sanity board may be used. United States v. Jancare, 22 M.J. 600 (A.C.M.R. 1986).

3. The proper authority to order a mental examination prior to referral of charges is the convening authority with immediate responsibility for the disposition of charges. After referral the proper authority is normally the military judge. R.C.M. 706(b).

4. A "sanity board" of one or more physicians conducts the mental examination of the accused. At least one member of the board should be a psychiatrist. R.C.M. 706(c)(1).

5. Multiple examinations are permissible. The accused's right to a speedy trial is not violated when the government delays the case for the time reasonably necessary to complete a thorough mental evaluation. United States v. Freeman, 23 M.J. 531 (A.C.M.R. 1986); United States v. Palumbo, 24 M.J. 512 (A.F.C.M.R. 1987) (45 days reasonable); United States v. Pettaway, 24 M.J. 539 (N.M.C.M.R. 1987) (36 days reasonable time for second sanity board); Lozinski v. Wetherill, 44 C.M.R. 106 (C.M.A. 1971); United States v. Colon-Angueira, 16 M.J. 20 (C.M.A. 1983).

6. The sanity board report is not admissible under hearsay rules. United States v. Benedict, 27 M.J. 253 (C.M.A. 1988).

7. The order to the board must contain the following questions, and any others that might be appropriate. R.C.M. 706(c)(2).

a. Did the accused have a mental disease or defect?

b. What is the clinical diagnosis?

c. Did the accused, as a result of mental disease or defect, lack substantial capacity to appreciate the criminality of his conduct?

d. Did the accused, as a result of mental disease or defect, lack substantial capacity to conform his conduct to the requirements of law?

e. Does the accused possess sufficient mental capacity to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense?

8. Confidentiality.

a. A statement of the conclusions of the board can be released to the trial counsel but the full contents of the board's report are protected from release to unauthorized personnel except pursuant to an order of the military judge. R.C.M. 706(c)(5).

b. Statements made by an accused at a compelled examination held pursuant to R.C.M. 706 are privileged. This privilege applies only on the issue of guilt or innocence and during sentencing proceedings. Mil. R. Evid. 302(a).

c. Not all communications between the accused and a psychiatrist are privileged. United States v. Toledo, 25 M.J. 270 (C.M.A. 1987). If, however, the psychiatrist is a member of the "defense team" the information is initially protected under the attorney-client privilege.

9. Defense expert.

a. An accused is entitled to access to a qualified psychiatrist or psychologist for the purpose of presenting an insanity defense if he establishes that his sanity will be a "significant factor" at the trial. United States v. Mustafa, 22 M.J. 165 (C.M.A. 1986); see Ake v. Oklahoma, 470 U.S. 68 (1985).

b. What is a significant factor?

(1) Mere assertion of insanity by accused or counsel is insufficient. Volson v. Blackburn, 794 F.2d 173 (5th Cir. 1986).

(2) A "clear showing" by the accused that sanity is in issue and a "close" question that might be decided one way or the other is required. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986).

c. Does the sanity board provide impartial psychiatric assistance?

(1) Yes - United States v. Davis, 22 M.J. 829 (N.M.C.M.R. 1986) (the sanity board provides the accused with impartial psychiatric assistance); United States v. Garries, 22 M.J. 288 (C.M.A. 1986) (in the usual case, the investigative, medical and other expert services in the military are sufficient to permit the defense to adequately prepare for trial).

(2) No - United States v. Sloan, 776 F.2d 926 (10th Cir. 1986); United States v. Crews, 781 F.2d 826 (10th Cir. 1986); see also United States v. Toledo, 26 M.J. 104 (C.M.A. 1988) (recognizes the accused may need a psychiatrist to become part of "defense team").

B. Trial.

1. The military judge rules finally as to whether an inquiry should be made into the sanity of the accused and as to whether the accused possesses sufficient mental capacity to stand trial. The issue of mental responsibility at the time of the offense is usually submitted to the court during deliberations. R.C.M. 706(b)(2); R.C.M. 916(k)(3)(B).

2. Presumption of sanity.

a. Former standard. Once some evidence was introduced that could reasonably tend to show that the accused was insane, the government had the burden of proving beyond a reasonable doubt that the accused was sane. United States v. Cockerell, 49 C.M.R. 567 (A.C.M.R. 1974); United States v. Morris, 43 C.M.R. 286 (C.M.A. 1971); United States v. Parker, 15 M.J. 146 (C.M.A. 1983).

(1) "Some evidence" to raise insanity issue was not subject to precise definition. See United States v. Thomas, 48 C.M.R. 865 (A.C.M.R. 1974); United States v. Banghart, 48 C.M.R. 982 (A.F.C.M.R. 1974).

(2) The sanity of an accused could be established by lay witnesses or by the circumstances surrounding the offense. United States v. Bobbitt, 48 C.M.R. 302 (A.F.C.M.R. 1974).

(3) After the issue was raised by the evidence, the presumption of sanity was removed and only an inference that "most people are mentally responsible" remained.

b. New standard. The presumption of sanity continues until the accused establishes that he was not mentally responsible at the time of the alleged offense. R.C.M. 916(k)(3)(A).

3. If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, must release the full psychiatric report to the government, with the statements of the accused redacted from the report. If the defense offers statements of the accused, the military judge may, upon motion, release such statements as may be necessary in the interests of justice. Mil. R. Evid. 302(c).

4. Where the defense proffers expert testimony concerning the accused's mental responsibility or capacity, the accused may be required to submit to psychiatric evaluation by government psychiatrists as a condition to the admission of defense psychiatric evidence. United States v. Babbidge, 40 C.M.R. 39 (C.M.A. 1969); M.R.E. 302(d).

a. The accused has no right to remain silent or right to counsel at a sanity evaluation to determine competency, as this is not a "critical stage" in the criminal proceeding. United States v. Olah, 12 M.J. 773 (A.C.M.R. 1981).

b. Refusal to cooperate in an ordered mental examination may result in the accused being prohibited from presenting expert testimony. Mil. R. Evid. 302(d).

5. A medical board member may testify as to his own opinion, but not as to the board's opinion. See United States v. Howard, 42 C.M.R. 149 (C.M.A. 1970); United States v. Smith, 47 C.M.R. 952 (A.C.M.R. 1973).

6. Credibility and weight of expert testimony are issues for the fact finder. See United States v. Wilson, 40 C.M.R. 112 (C.M.A. 1969).

7. M.R.E. 302(b)(2) seems to condition the use of expert testimony by the prosecution on prior use of experts by the defense. The Court of Military Appeals has rejected such an interpretation, stating the rule only applies to statements of the accused and does not bar expert testimony. United States v. Bledsoe, 26 M.J. 97 (C.M.A. 1988); United States v. Matthews, 14 M.J. 656 (A.C.M.R. 1982).

8. The military rejects adoption of Fed. R. Evid. 704(b); ultimate opinion testimony is still admissible.

C. The Sanity Inquiry.

1. Compelled examination under R.C.M. 706.

a. UCMJ art. 31 does not apply.

b. The accused's failure to cooperate in an examination can result in the exclusion of defense expert evidence.

2. MRE 302. Privilege Concerning Mental Examination of an Accused.

a. General rule. The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under R.C.M. 706 and any derivative evidence obtained through use of such a statement from being received into evidence against him on the issue of guilt or innocence or during sentencing proceedings. This privilege may be claimed by the accused notwithstanding the fact that he may have been warned of the rights provided by M.R.E. 305.

b. Exceptions.

(1) No privilege exists under this rule when the accused first introduces into evidence such statements or derivative evidence.

(2) An expert witness for the prosecution may testify as to the reasons for the expert's conclusions and the reasons therefor as to the mental state of the accused, provided expert testimony offered by the defense as to the mental condition of the accused has been received in evidence. Such testimony may not extend to statements of the accused except as provided in (1), above.

c. Only applies to examinations ordered under R.C.M. 706.

d. Only applies during merits and sentencing.

e. MRE 302 seems to condition the use of expert testimony by the prosecution on prior use of experts by the defense. The Court of Military Appeals has rejected such an interpretation, finding that lay testimony can permit the government to use its experts. United States v. Bledsoe, 26 M.J. 97 (C.M.A. 1988); see also United States v. Matthews, 14 M.J. 656 (A.C.M.R. 1982).

f. What is "derivative evidence?" Any factual evidence given by the accused to his evaluators but not the diagnosis offered by the defense expert.

D. Defense Notice Requirements. R.C.M. 701(b)(2).

1. Manual Standard. If the defense intends to rely upon the defense of lack of mental responsibility or to introduce expert testimony relating to the defense of lack of mental responsibility, the defense shall, before the beginning of trial on the merits, notify the trial counsel of such intention.

2. Exclusion of the defense expert, however, should be a remedy of last resort. Most problems of this nature can be obviated by the granting of a continuance. United States v. Walker, 25 M.J. 713 (A.C.M.R. 1987).

E. Presentence Proceedings.

1. Mitigation. The court, in determining an appropriate sentence, may consider evidence of the accused's mental condition which falls short of creating a reasonable doubt as to his sanity. See United States v. Cook, 29 C.M.R. 395 (C.M.A. 1960); United States v. Wheeler, 38 C.M.R. 72 (C.M.A. 1967); United States v. Slaton, 6 M.J. 254 (C.M.A. 1979). A trial judge must tailor his sentencing instructions concerning mental impairment to both the law and the evidence; the model instruction in the Army's Military Judges' Guide is not necessarily required. Id.; United States v. Smalls, 6 M.J. 346 (C.M.A. 1979).

2. Aggravation. The court, in determining the severity of a sentence, may consider evidence tending to show that an accused has little regard for the rights of others, such as evidence showing he possesses homicidal tendencies. See generally United States v. Bono, 26 M.J. 240 (C.M.A. 1988).

3. Incarceration. Military law establishes no mandatory requirement for incarceration of the criminally insane. See United States v. Schlomann, 37 C.M.R. 34 (C.M.A. 1966).

4. After Guilty Plea. If an insanity issue is raised after a guilty plea, further inquiry must be undertaken into accused's sanity. See United States v. Batts, 42 C.M.R. 123 (C.M.A. 1970); United States v. Braye, 47 C.M.R. 949 (A.C.M.R. 1973).

F. Post-Trial.

1. Where inquiry after trial produces new information which raises an issue of mental responsibility, appropriate action may be taken. United States v. Norton, 46 C.M.R. 213 (C.M.A. 1973). This includes a rehearing, United States v. Dock, 28 M.J. 117 (C.M.A. 1989), provided a substantial question is raised either as to mental capacity or mental responsibility. United States v. Logan, 31 M.J. 910 (A.F.C.M.R. 1990).

2. The accused must possess sufficient mental capacity to understand the review proceedings. Where the review proceedings have essentially been completed, a subsequent lack of mental capacity does not bar service of the Court of Military Review's decision. United States v. Phillips, 13 M.J. 858 (N.M.C.M.R. 1982).